Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

[Names Of Counsel Appear on Inside Front Cover]

January 12, 1999

138 pp

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QUESTIONS PRESENTED

(1) Where the Secretary of the Interior, under § 5 of the Boulder Canyon Project Act, allocates Colorado River water from the Central Arizona Project to individual Indian tribes, municipal and industrial users, and non-Indian agricultural users, in that order of priority, and contracts with non-Indian agricultural users for specified percentages of the total supply remaining after the senior allocations have been satisfied:

(a) May the Secretary subsequently increase the allocation to an Indian user, thereby reducing the water available under the junior users' contracts, without liability to those users?

(b) May the Secretary do so without liability if the reallocation is directed by Congress at the Secretary's request?

(2) Does a contract clause providing that the United States "assumes no responsibility with respect to the quantity of water available for delivery" excuse the government from liability where the government determines to reallocate the water to another user?

(3) Does water allocated "to the Central Arizona Project" in a statutory settlement of non-Indian CAP users' claims to other water used to settle Indian claims against the United States inure to the benefit of the non-Indian users under the Secretary's CAP allocations and implementing contracts?

(4) Is the Ninth Circuit's application of the "unmistakability doctrine" to absolve the government from liability when Congress reallocates previously contracted-for water to another user consistent with this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996)?

RULE 29.6 LISTING

All of the parties are listed on the cover. None of the petitioners have parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LISTING ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Introduction 2

1. The Boulder Canyon Project Act of 1928 3

2. The Colorado River Basin Project Act of 1968 .. 4

3. The Secretary's 1983 Allocation Decision 5

4. The Districts' Contracts 6

5. The Ak-Chin Settlement Act of 1984 7

6. The San Carlos Apache Tribe Water Rights Settlement Act 9

7. The District Court Decision 10

TABLE OF CONTENTS--Continued

Page

8. The Ninth Circuit Decision 12

REASONS FOR GRANTING THE WRIT 14

I. THIS CASE INVOLVES ISSUES OF GREAT IMPORTANCE CONCERNING THE SECRETARY'S AUTHORITY UNDER § 5 OF THE BOULDER CANYON PROJECT ACT TO ALLOCATE COLORADO RIVER WATER. 14

A. The Scope of the Secretary's Authority to Reallocate and Transfer Rights to Colorado River Water Has Become Critically Important 14

B. The Ninth Circuit's Decision Gives The Secretary Virtually Unfettered Discretion to Revoke Settled Rights Under His Own Pre-existing Allocation Decisions And Contracts, And Creates a Remarkable Precedent Warranting Review And Correction by This Court 16

1. The Court of Appeals Held That the Secretary's Broad § 5 Allocation Authority Includes the Authority to Reallocate Contracted-For Water Without Compensation 17

TABLE OF CONTENTS-Continued

Page

2. The Court of Appeals Held That A Broad Disclaimer Clause in the Secretary's Master Repayment Contract With CAWCD Absolves the Government of Liability Under the Subcontracts When It Provides that Same Water To Another User 18

3. The Court of Appeals Fundamentally Misconstrued The Ak-Chin Settlement Act, and Thus Deprived Arizona Municipal, Industrial, and Non-Indian Agricultural Users of Water Previously Committed to Them Under Their Contracts Without Compensation 21

II. THE NINTH CIRCUIT'S USE OF THE "UNMISTAKABILITY DOCTRINE" DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *UNITED STATES V. WINSTAR CORP.* 26

CONCLUSION 30

APPENDIX A (Ninth Circuit Decision) 1a

APPENDIX B (Order Granting Permission to Appeal) .. 22a

APPENDIX C (District Court Decision) 23a

TABLE OF CONTENTS-Continued

Page

APPENDIX D (Boulder Canyon Project Act) 49a

APPENDIX E (Colorado River Basin Project Act) 50a

APPENDIX F (Ak-Chin Settlement Act of 1984) 55a

APPENDIX G (SCAT Act) 58a

APPENDIX H (Secretary's 1983 Allocation Decision) . 60a

APPENDIX I (Representative Subcontract) 88a

APPENDIX J (Master Repayment Contract) 94a

TABLE OF AUTHORITIES

CASES: **Page**

Arizona v. *California*, 373 U.S. 546 (1963) 3, 4, 14

Arizona v. California, 439 U.S. 419 (1979) 16

Arizona v. California, 460 U.S. 605 (1983) 15

California v. United States, 438 U.S. 645 (1978) 14

Dodge v. Board of Education, 302 U.S. 74 (1937) 27

O'Neill v. United States, 50 F.3d 677, *cert. denied*, 516 U.S. 1028 (1995) 13

Orange Cove Irrigation Dist. v. United States, 28 Fed. Cl. 790 (1993) 20

United States v. Winstar Corp., 518 U.S. 839 (1996) ..... *passim*

STATUTES:

Ak-Chin Settlement Act of 1978 7

Ak-Chin Settlement Act of 1984, Pub. L. No. 98-530, 98 Stat. 2698 (Oct. 19, 1984) ..... *passim*
§ 2(a), 98 Stat. 2698 2
§ 2(b), 98 Stat. 2698-99 2
§ 2(c), 98 Stat. 2699 ..... 2, 7
§ 2(f), 98 Stat. 2699-2700 2

TABLE OF AUTHORITIES--Continued

Page

§ 2(k), 98 Stat. 2701 ..... 2, 8, 12, 25

Boulder Canyon Project Act of 1928 ..... 1, 2
§ 1, 43 U.S.C. § 617 3
§ 5, 43 U.S.C. § 617d ..... *passim*
§ 13, 43 U.S.C. § 617*l* 3

Colorado River Basin Project Act of 1968,
43 U.S.C. §§ 1501 et seq. 1, 4
43 U.S.C. § 1521(a), (b) 1
43 U.S.C. § 1524(b) 1, 4, 5

Reclamation Act of 1902, 43 U.S.C. §§ 1372 et seq. ... 14

San Carlos Apache Tribe Water Rights Settlement Act
of 1992, Pub. L. No. 102-575, 106 Stat. 4740
(Oct. 30, 1992) 2, 10
§ 3704(a), 106 Stat. 4742-43 2
§ 3708(f), 106 Stat. 4749 ..... 2, 10

28 U.S.C. § 1254(1) 1

RULES AND REGULATIONS:

Central Arizona Project, Arizona; Allocation of Project
Water for Indian Irrigation Use, 41 Fed. Reg. 45883
(Oct. 18, 1976) 5

Central Arizona Project (CAP) Water Allocation and
Water Service Contracting; Final Reallocation
Decision, 57 Fed. Reg. 4470 (Feb. 5, 1992) .. 9-10, 24

TABLE OF AUTHORITIES--Continued

Page

Secretary of the Interior's Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision, 48 Fed. Reg. 12447 (Mar. 24, 1983) ..... *passim*

LEGISLATIVE HISTORY:

130 Cong. Rec. S11837 (daily ed. Sept. 25, 1984) 8

130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) (statement of Sen. DeConcini) 22

138 Cong. Rec. S169596 (daily ed. Oct. 5, 1992) 10

Fort McDowell Indian Water Rights Settlement Act of 1990: Joint Hearing Before the House Comm. on Interior and Insular Affairs and the Senate Select Comm. on Indian Affairs, 101st Cong. (July 17, 1990) (statement of Timothy W. Glidden) 9

Living Within California's Annual Colorado River Apportionment, Third Quarterly Progress Report to the Joint Legislative Budget Committee of the California Legislature from the Colorado River Board of California (Apr. 1998) 14, 15, 16

R. L. Wilbur & N. Ely, The Hoover Dam Documents, H.R. Doc. No. 80-717 (1948) 16

TABLE OF AUTHORITIES--Continued

Page

OTHER AUTHORITIES:

Address by Secretary of the Interior Bruce Babbitt before the 1997 Annual Conference of the Colorado River Water Users Association at Las Vegas, Nevada (Dec. 18, 1997) 15

Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water,* 16 Va. Envtl. L.J. 363 (1997) 13, 21

Letter from Gov. Bruce Babbitt to Sec. James Watt (Nov. 1, 1983) 8

Letter from Sec. James Watt to Congressman Morris D. Udall (Oct. 7, 1983) 8

Western Water Policy Review Advisory Commission, Water in the West: Challenge for the Next Century (June 1998) 21

Petitioners Maricopa-Stanfield Irrigation and Drainage District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation & Drainage District respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 158 F.3d 428 (9th Cir. 1998) and is reprinted at App. A.[1] The opinion of the United States District Court for the District of Arizona is unreported and is reprinted at App. C. The order of the Court of Appeals granting interlocutory review is unreported and appears at App. B.[2]

JURISDICTION

The Ninth Circuit entered its decision on October 14, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of § 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, are reprinted at App. D.

The relevant sections of the Colorado River Basin Project Act, 43 U.S.C. §§ 1501, 1521(a) and (b), and 1524(b) are reprinted at App. E.

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[1] References to "App. ___" are to the appendix filed with this petition.

[2] The court of appeals issued its original opinion reversing the district court on July 7, 1998. The Districts then filed a petition for rehearing and suggestion for rehearing *en banc*. The court did not specifically rule on the Districts' petition or suggestion for rehearing *en banc*. However, the court withdrew its original opinion and substituted the revised opinion on October 14, 1998.

The relevant sections of the Ak-Chin Settlement Act of 1984, Pub. L. No. 98-530, §§ 2(a), (b), (c), (f), and (k), 98 Stat. 2698-2700, 2701 (Oct. 19, 1984) are reprinted at App. F.

The relevant sections of the San Carlos Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-575, §§ 3704(a), 3708(f), 106 Stat. 4740, 4742-43, 4749 (Oct. 30, 1992), are reprinted at App. G.

The Secretary of the Interior's Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision, 48 Fed. Reg. 12447 (Mar. 24, 1983) is reprinted in full at App. H.

The relevant sections of the Bureau of Reclamation's Subcontract Among the United States, the Central Arizona Water Conservation District, and the Maricopa-Stanfield Irrigation District Providing for Water Service, Central Arizona Project (Nov. 21, 1983) ("Subcontract") are reprinted at App. I.

The relevant sections of the Bureau of Reclamation's Contract Between the United States and the Central Arizona Water Conservation District ("CAWCD") for Delivery of Water and Repayment of Costs of the Central Arizona Project (amended Nov. 28, 1988) are reprinted at App. J.

STATEMENT OF THE CASE

Introduction. This case involves the question whether the federal government is liable for damages when the Secretary of the Interior ("Secretary"), acting pursuant to his authority to allocate Colorado River water under § 5 of the Boulder Canyon Project Act of 1928 ("BCPA"), contracts with one user for the provision of water and later reduces the quantity of water available under that contract by reallocating that water to another user. The district court answered that question in the affirmative. The Ninth Circuit, however, reversed, holding

essentially (1) that the Secretary retained virtually unlimited authority to reallocate previously contracted-for Colorado River water and (2) that no such reallocation could subject the government to liability for damages unless both the Secretary's and Congress' reallocation authority had been relinquished in "unmistakable terms." App. A at 20a-21a.

Petitioners are three Arizona irrigation districts, municipal corporations formed to distribute water within their respective service areas (the "Districts"). The Districts contracted with the Secretary to receive, on an annual basis, fixed percentages of a residual pool of water developed by a federal system of dams, reservoirs, and aqueducts, known as the "Central Arizona Project" ("CAP"), and designed to supply Colorado River water to central Arizona. Respondent is the United States, which through the Secretary, has constructed the CAP and agreed to provide the water under the Districts' contracts.

1. The Boulder Canyon Project Act of 1928. This Court held in *Arizona v. California* that in § 5 of the BCPA, Congress had given the Secretary broad authority "both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States [Arizona, California, and Nevada] and to decide which users within each State would get water." 373 U.S. 546, 580 (1963)[3]. With respect to contract entitlements for

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[3]Congress enacted the BCPA to provide a federal solution to serious and long-standing Colorado River water problems. The BCPA ratified the Colorado River Compact, which had divided the river basin into an "Upper Basin" (Colorado, New Mexico, Utah, and Wyoming) and a "Lower Basin" (Arizona, California, and Nevada), and apportioned to each Basin the right to consume 7.5 million acre-feet of Colorado River water annually. 43 U.S.C. § 617*l*. Section 1 of the BCPA authorized the Secretary to "construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River." 43 U.S.C. § 617. Section 5 authorized the Secretary "to

(continued...)

individual users, the Court held that the Secretary had discretion to choose with whom and under what terms to contract, and that in so doing, "is not bound . . . to follow state law." *Id.* at 586. Before now, this Court has had no opportunity to delineate further the contours of the Secretary's or Congress' authority with regard to the allocation of the waters of the Colorado River among contracting parties within each state.

2. The Colorado River Basin Project Act of 1968. In 1968, Congress passed the Colorado River Basin Project Act ("CRBPA"), 43 U.S.C. §§ 1501 *et seq.*, which authorized the Secretary to construct the CAP to enable Arizona users to put to beneficial use that portion of Arizona's annual apportionment of Colorado River water not previously allocated. Like the BCPA, the CRBPA did not specifically define the Secretary's authority to determine who would be permitted to contract for CAP water. In 1972, pursuant to the CRBPA, the Secretary entered into a Master Repayment Contract ("Master Repayment Contract") with the Central Arizona Water Conservation District ("CAWCD"), a public entity created by the State of Arizona to contract with the United States for delivery of the CAP's water supply and to repay Arizona's share of the project costs.[4] Pursuant to the CRBPA and the Master Repayment Contract, the Secretary and the CAWCD were to enter into subcontracts with Arizona municipal and industrial users and non-Indian agricultural users for the CAP supply. 43 U.S.C.

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[3](...continued)
contract for the storage of water . . . and for the delivery thereof . . . for irrigation and domestic uses," and provided that "[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract [with the Secretary]." 43 U.S.C. § 617d, App. D at 49a.

[4]See 43 U.S.C. § 1524(b), App. E at 53a-54a; Master Repayment Contract (included in the record below in the Appellant's Excerpt of Record at 129), App. J at 94a-95a.

§ 1524(b), App. E at 53a-54a. The Secretary alone would contract with Indian tribes for their allocated shares of CAP water. See *id.*

3. The Secretary's 1983 Allocation Decision. The Secretary decided to determine systematically in advance how CAP water should be allocated and who specifically should have the opportunity to contract, and for this task the Secretary requested recommendations from the State of Arizona as to how the CAP supply should be allocated among non-Indian users. In 1983, the Secretary issued a Final Water Allocation Decision "to allocate waters developed by the . . . (CAP) and to proceed with water service contracting with Indian and non-Indian users for the delivery of Arizona's remaining entitlement to Colorado River water." App. H at 61a. The decision made specific, individual, allocations of water, totaling 309,828 acre-feet, to twelve Indian tribes, based upon careful analysis of the water actually needed by each tribe. *Id.*; see also Central Arizona Project, Arizona; Allocation of Project Water for Indian Irrigation Use, 41 Fed. Reg. 45883 (Oct. 18, 1976). Next, accepting the state's recommendation, the Secretary allocated specific quantities of water, totaling 640,000 acre-feet, to eighty-five municipal and industrial ("M&I") users. App. H at 71a. Finally, also in accordance with the State's recommendations, the Secretary allocated fixed percentages of all "remaining supplies" to twenty-two non-Indian agricultural users, including the Districts.[5] *Id.* While the Secretary retained jurisdiction over "water not contracted for, or contracted for but not expected to be utilized during interim periods," *id.* at 62a,

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[5]The Secretary's Allocation Decision specified that in times of water shortage, deliveries to Indian tribes would be given the highest priority, then M&I deliveries, followed by non-Indian agricultural users, which would be the first group to experience curtailment in times of drought or shortage.

the Secretary did not otherwise reserve authority to amend the 1983 allocations.

4. The Districts' Contracts. Within months, the Districts and other allottees under the Secretary's decision entered into long-term contracts to secure their rights to the allocated water.[6] In accordance with the Secretary's decision, the Districts contracted to receive specified percentages of "the total supply of Agricultural Water available for delivery from the Project." Subcontracts ¶ 4.13(a), App. I at 90a.[7] The Secretary specifically committed to "use all reasonable diligence to make available to the [Districts] the quantity of Project Water requested under their contracts, and affirmed that the government would "use [its] best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract." Subcontracts ¶¶ 4.1, 4.4(b)(i), App. I at 88a, 89a-90a. In exchange for and in reliance on these commitments, the Districts undertook very substantial financial obligations, obviously

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[6] *E.g.*, Subcontract Among the United States, the Central Arizona Water Conservation District, and the Maricopa-Stanfield Irrigation & Drainage District Providing for Water Service, Central Arizona Project, ¶ 4.13(a) (Nov. 21, 1983) ("Subcontract"). The Districts' subcontracts are identical in all relevant respects. Relevant provisions are set forth at App. I.

[7] "Agricultural water" is defined in the Master Repayment Contract as "project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres." § 5.12, App. J at 94a. Under the Secretary's Allocation Decision, the "total supply of Agricultural Water available" in a given year was to consist not only of the excess of the total expected CAP supplies over the amounts allocated to specific Indian tribes and M&I users, but also any water allocated to a tribe or M&I contractor that that contractor did not actually use in that year." App. H at 80a.

relying on the quantity of water for agricultural production to which they would be entitled under their subcontracts.[8]

5. The Ak-Chin Settlement Act of 1984. Shortly after the Districts' and other allottees' contracts were signed, the Secretary reached an agreement with the Ak-Chin Indian Community of central Arizona to amend an earlier statutory commitment that the government had made to the community. Under the Ak-Chin Settlement Act of 1978, the government was obligated to provide the Ak-Chin with an interim water supply by 1984 and a permanent water supply of 85,000 acre-feet per year by 2003. Under the negotiated compromise, which became the Ak-Chin Settlement Act of 1984 ("Ak-Chin Settlement Act"), the Ak-Chin would accept a somewhat lesser amount of water in exchange for receiving their permanent supply by 1988. § 2(c), 98 Stat. 2699, App. F at 55a-56a.

The Secretary proposed to satisfy this compromise commitment to the Ak-Chin through two sources: (1) a portion -- 50,000 acre-feet -- of the Colorado River water for which the Yuma-Mesa Irrigation and Drainage District ("Yuma-Mesa") had contracted in 1956 but which it had never developed or used, and (2) the water -- 58,300 acre-feet -- that had been

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[8]The subcontracts obligated the Districts to pay substantial operation and maintenance charges for the backbone CAP facilities, in addition to a substantial annual "agricultural subcontract charge," of approximately $215,000, to be paid annually until the CAP facilities were completed, and credited against later per-acre-foot capital charges. Subcontracts ¶ 5.1, 5.2(a), (c)-(d), App. I at 91a-93a. Finally, each District was required to execute a construction contract with the Secretary, under which it was (and is) obligated to repay the entire cost of the distribution system that would be used to serve it, at a total cost of hundreds of millions of dollars. See, e.g., Contract Between the United States and the Central Arizona Irrigation and Drainage District providing for Construction of a Water Distribution System, Central Arizona Project (Nov. 21, 1983) (included in the Appellees' Supplemental Excerpt of Record on Appeal at 147).

allocated to the Ak-Chin in the Secretary's 1983 Allocation Decision. This portion of the Secretary's proposal, however, created a problem: Arizona had included the 50,000 acre-feet of unused Yuma-Mesa water in its CAP allocation recommendations which the Secretary had accepted and incorporated into his 1983 Allocation Decision; and other users, including the Districts and other non-Indian agricultural users, consequently believed that the unused Yuma-Mesa water was part of the pool already committed to them under their recent CAP contracts. See, *e.g.*, Letter from Governor Bruce Babbitt to Secretary James Watt, dated Nov. 1, 1983 (included in the Appellant's Excerpts of Record at 334-35). The Secretary disagreed, contending that the 50,000 acre-feet at issue had not been included in the CAP allocations and was not committed under existing contracts. See, *e.g.*, Letter from Secretary James Watt to Congressman Morris D. Udall, dated Oct. 7, 1983, at 6 (included in the Appellant's Excerpts of Record at 328-33).

When the Secretary's proposed compromise was presented to Congress, Arizona Senators Barry Goldwater and Dennis DeConcini negotiated and included an amendment to settle the dispute between the non-Indian CAP users and the Secretary over the Secretary's right to reallocate 50,000 acre-feet of water to the Ak-Chin. See 130 Cong. Rec. S11837-38 (daily ed. Sept. 25, 1984) (included in Appellees' Supplemental Excerpt of Record on Appeal at 95). The amendment specified that whenever the aggregate water supply available from these proposed sources exceeded the quantity to which the Ak-Chin were entitled under the 1984 Act (which it generally would, by approximately 33,300 acre-feet), "the Secretary shall allocate on an interim basis *to the Central Arizona Project* any of the water . . . which is not required for delivery to the Ak-Chin Indian Reservation under this Act." § 2(k), 98 Stat. 2701, App. F at 57a (emphasis added).

The amendment thus settled the dispute over rights to the 50,000 acre-feet of Yuma-Mesa water by allowing the Secretary to increase the water allocated to the Ak-Chin, but explicitly confirming that the 33,300 acre-feet of the 1983 Ak-Chin CAP allocation which the Ak-Chin were relinquishing in the Settlement Act would be committed (when available, allowing for low-water or drought conditions) to the CAP. Under the CAP allocation and contract structure adopted by the Secretary a few months earlier, this meant that the water would inure to the benefit of non-Indian agricultural users, except in a dry year when it might be needed to satisfy higher priority commitments to the Ak-Chin or the M&I users. Confirming the necessary impact of the Ak-Chin compromise, the Secretary's Master Repayment Contract with the CAWCD, as amended in 1988, explicitly defined the "Project water" to be delivered pursuant to that contract and the subcontracts with non-Indian users to include any water "required to be delivered by the Secretary through the [CAP], pursuant to the Ak-Chin Water Rights Settlement Act." ¶ 5.27(d), App. J at 94a-95a.

6. The San Carlos Apache Tribe Water Rights Settlement Act. Prior to 1990, the Secretary appeared to recognize that reallocation of this 33,300 acre-feet of water to a specific Indian tribe would at a minimum require an amendment to the Ak-Chin Settlement Act. See *Fort McDowell Indian Water Rights Settlement Act of 1990, Joint Hearing Before the House Comm. on Interior and Insular Affairs and the Senate Select Comm. on Indian Affairs,* 101st Cong. 40 (July 17, 1990) (statement of Timothy W. Glidden). In the early 1990s, however, the Secretary took the position that the water explicitly committed by Congress to the CAP in 1984 was not subject to existing contracts, and that he was free to reallocate that water to the San Carlos Apache Tribe, in settlement of the Tribe's water rights claims against the United States. See Central Arizona Project

(CAP) Water Allocation and Water Service Contracting; Final Reallocation Decision, 57 Fed. Reg. 4470, 4476 (Feb. 5, 1992).

Senator DeConcini, who had proposed the relevant language of the Ak-Chin Settlement Act in 1984, disagreed, as did the non-Indian agricultural users who had contracted to receive the pool of water into which the Secretary was now dipping. Thus, Senator DeConcini initially refused to support any San Carlos Apache settlement that relied upon that 33,300 acre-feet of water, unless the settlement included compensation for the non-Indian agricultural users. Ultimately, Senator DeConcini negotiated a compromise which confirmed the settlement with the San Carlos Apache, but gave non-Indian agricultural users the right to sue the government for damages for breach of their contracts, rather than providing the damage remedy directly. 138 Cong. Rec. S169596 (daily ed. Oct. 5, 1992). This compromise was adopted, and the San Carlos Apache Tribe Water Rights Settlement Act of 1992 ("SCAT Act") was enacted on October 30, 1992. Section 3708(f) gave the district court authority to entertain any "claim . . . filed within two years of the date of enactment of this Act . . . that the reallocation of water to the Tribe . . . has unlawfully deprived . . . contractors of CAP water of legal rights to such water." App. G at 58a-59a.

7. The District Court Decision. On October 28, 1994, the Districts brought suit in the district court below pursuant to § 3708(f) of the SCAT Act. On cross motions for summary judgment, the district court ruled in favor of the Districts on the issue of liability. First, the court recognized that "[i]f . . . the [33,300 acre-feet of] Ak-Chin surplus water was statutorily allocated to the general CAP supply then the water was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users." App. C at 35a. The court then set about determining whether the Ak-Chin

Settlement Act had in fact committed the disputed water to the general CAP supply, or whether, as the Secretary argued, the Act had given him unfettered discretion to allocate the water to "any CAP user."

In this regard, the court recognized that the relevant language of the Act, which requires the Secretary to allocate the water disputed here "to the CAP," had been included and enacted in settlement of conflicting claims to the unused Yuma-Mesa water that the Act committed to the Ak-Chin community. App. C at 26a-28a. Thus, "[u]nder the Ak-Chin Settlement Act, the CAP's disputed rights to 50,000 acre-feet were converted into settled rights to 33,300 acre-feet in a normal year." *Id.* at 38a. In addition, the court noted that "within the context of [the] CAP each of the allottees receives the amount that was allotted to [it] pursuant to the 1983 Allocation Decision and subsequent delivery contracts." *Id.* In this context, the court concluded that in committing water to "the CAP," the Ak-Chin Settlement Act had explicitly provided that that water would be subject to the Secretary's 1983 Allocation Decision and the implementing contracts: "The Ak-Chin Settlement Act's requirement that the Secretary allocate the excess water to the CAP could not mean that the Secretary may allocate the water to any CAP user but, instead, that he may allocate the water to the CAP general pool, according to the previously established allocations and delivery contracts." *Id.* at 40a.

After concluding that the water relinquished by the Ak-Chin had been committed to the general CAP pool, the district court addressed the more specific issue of whether reallocating that water to the San Carlos Apache deprived the Districts of any contractual property right. In that regard, the court noted that the Districts had contracted to receive 43% of the residual CAP pool, which "is made up of water not required for delivery pursuant to the allotment contracts of the other CAP users of

higher priority." *Id.* at 38a-39a. Although "the Districts' pool 'existed only at the mercy of the prior demands of the Indians and M&I users,'" the district court recognized that "these demands are limited to the amount allocated to them in the Secretary's 1983 Allocation Decision and confirmed in contracts." *Id.* at 46a (citation omitted). Thus, the district court concluded, "Removing water specifically allotted to the CAP general supply to settle [additional] claims of one user is tantamount to increasing that user's allotment with water already contracted for by another user." *Id.*

Accordingly, the district court determined that the government had breached the Districts' contracts and taken their property without just compensation when Congress, at the Secretary's request, reduced the CAP supply available to M&I and non-Indian agricultural users by committing an additional 33,300 acre-feet of CAP water annually to the San Carlos Apache.

8. The Ninth Circuit Decision. The Ninth Circuit reversed. The court of appeals concluded that the petitioners did not have a property interest in the water the Secretary had reallocated, and that any breach of contract or 5th Amendment takings claim must necessarily fail. Basing its decision primarily on § 2(k) of the Ak-Chin Settlement Act, virtually without reference either to the context or history of that provision, or to the existing CAP structure and the place the Districts' contracts occupy in that structure, the court of appeals held that because the language of the Ak-Chin Settlement Act did not specify that the water should be allocated to the non-Indian agricultural pool or to any particular user, the Act did not give the Districts any right to the reallocated water. App. A at 14a.

In addition, the court concluded that ¶ 8.12 of the Master Repayment Contract, which provides that the government will

not be liable for a failure to deliver water "for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping," absolved the government of any liability for failure to deliver water to the Districts. The district court had concluded that while under ¶ 8.12 the government would not be "liable if there is a shortage of water available to [the] CAP as a whole," the Districts nonetheless "did not bear the risk that the Secretary would remove water from the general CAP pool to satisfy one of its independent obligations," App. C at 40a. The court of appeals, however, relying on its own opinion in *O'Neill v. United States*, 50 F.3d 677 (1995), interpreted this clause -- a version of which "appear[s] in the Secretary's reclamation contracts with high consistency" -- to excuse performance where the government simply decides to provide the water at issue to another party. See Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 Va. Envtl. L.J. 363, 394 & n.179 (1997); App. A at 20a-21a.

Finally, again relying on its own decision in *O'Neill*, and without citation to this Court's subsequent decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the court held that neither the Secretary's contracts nor the Ak-Chin Settlement Act relinquished the government's (presumed) authority to reallocate Colorado River water in "unmistakable terms." *Id.* Thus, the court held that both the contracts and the Act remained subject to later legislation, including legislation such as the SCAT that simply reallocated water committed under the Secretary's pre-existing contracts to a different party, and that the government was not liable for damages. *Id.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES ISSUES OF GREAT IMPORTANCE CONCERNING THE SECRETARY'S AUTHORITY UNDER § 5 OF THE BOULDER CANYON PROJECT ACT TO ALLOCATE COLORADO RIVER WATER.

A. The Scope of the Secretary's Authority to Reallocate and Transfer Rights to Colorado River Water Has Become Critically Important.

In *Arizona v. California*, 373 U.S. 546, 579-80 (1963), this Court held that in § 5 of the BCPA Congress had conferred upon the Secretary unprecedented authority to allocate the waters of the Colorado River among the States of Arizona, California, and Nevada, as well as to individual users within those states, without regard to state law.[9] This case presents the Court with its first opportunity to articulate further the contours of that authority. The scope and effect of this unique authority under the century-old federal Reclamation Law is the subject of growing controversy and threatened litigation as the water demands in the three states, including long-dormant Indian needs, increasingly press against a limited Colorado River supply.[10] The important issues presented in this petition require

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[9]For background concerning the Reclamation Act of 1902, 43 U.S.C. §§ 1372 *et seq.*; and the ways in which the Secretary's § 5 allocation authority differs from his authority under that Act, see *California v. United States*, 438 U.S. 645 (1978).

[10]California is currently exceeding its normal annual apportionment under the *Arizona v. California* decree of 4.4 million acre-feet by about 800,000 acre-feet, Arizona is using almost all of its 2.8 annual apportionment, and Nevada will exhaust its 300,000 acre-feet annual apportionment in about seven years. *Living Within California's Annual Colorado River Apportionment*, Third Quarterly Progress Report to the Joint Legislative

(continued...)

resolution as these states attempt to address critical shortages by increasing emphasis on conservation, transfers of water from agricultural to urban users, and water "banking," *id.* at 1-7, while the federal government attempts to honor long-ignored trust obligations to Indian tribes. These issues should be resolved in the context of this Court's recognition that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). As the current Secretary has repeatedly emphasized, the parameters of § 5 contractual entitlements must be defined in order to provide the certainty needed to find solutions to the growing water supply problems facing the lower Colorado River Basin.[11]

The problem is of critical importance in Arizona, where several more proposed Indian water settlements involving substantial quantities of water, some of which may come from the CAP supply, are under negotiation. If the Ninth Circuit's decision stands, the Secretary's § 5 contracts will not be worth the paper on which they are printed, and Congress may find it attractive to shift additional portions of the economic burden of the national trust obligation to Arizona's Indian tribes from the nation's taxpayers to non-Indian agricultural users in Arizona, as the court of appeals did in this case.

Similar questions about the scope and effect of the Secretary's § 5 California allocations are brewing in that state. There the Secretary allocated all of California's annual

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[10](...continued)
Budget Committee of the California Legislature from the Colorado River Board of California (Apr. 1998) at 1 (hereafter "CRB Report").

[11]See, *e.g.*, Address by Secretary of the Interior Bruce Babbitt before the 1997 Annual Conference of the Colorado River Water Users Association in Las Vegas, Nevada (Dec. 18, 1997) at 3.

apportionment from the Colorado River to individual agencies by regulations and implementing contracts in the early 1930s.[12] Those allocations, however, did not include water for the Fort Mojave, Colorado River, and Chemehuevi Indian tribes and miscellaneous non-Indian users which this Court later determined in *Arizona v. California* held "present perfected rights" to water chargeable against California's annual apportionment. 439 U.S. 419, 429-35 (1979). Not surprisingly, the issue of how to integrate those omitted rights into the Secretary's California allocations is currently the subject of intense discussion. CRB Report, Attachment I at 2, 4.

As demonstrated below, the court of appeals' decision threatens the lower Basin's ability to deal with these important issues concerning the allocation and use of the limited supply of Colorado River water by holding that the Secretary possesses virtually complete authority to reallocate water in derogation of his own allocation decisions and contracts, without compensating those parties whose contractual rights are breached by the reallocation.

B. The Ninth Circuit's Decision Gives The Secretary Virtually Unfettered Discretion to Revoke Settled Rights Under His Own Pre-existing Allocation Decisions And Contracts, And Creates a Remarkable Precedent Warranting Review And Correction by This Court.

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[12] *See* R. L. Wilbur & N. Ely, The Hoover Dam Documents, H.R. Doc. No. 80-717, at A487, A491, A507, A595, A633 (1948).

1. *The Court of Appeals Held That the Secretary's Broad § 5 Allocation Authority Includes the Authority to Reallocate Contracted-For Water Without Compensation.*

Perhaps the most remarkable aspect of the court of appeals' decision is its bald assertion that "the Secretary retained his discretion [under § 5] to allocate and reallocate CAP water under the 1983 notice and under [the Districts'] subcontracts with the CAWCD." App. A at 18a. This statement underlies the court's entire opinion. Most strikingly, the court of appeals concluded that even if the Districts did enjoy an interest in the relinquished Ak-Chin water, to prove that they were entitled to that water "the Districts must prove that Congress [in the Ak-Chin Settlement Act] eliminated the Secretary's discretion to reallocate the excess Ak-Chin water." *Id.* The court thus assumed, as a necessary predicate to its analysis and ultimate conclusion, that the Secretary *has* the authority to reallocate the water purportedly committed under the 1983 Allocation Decision and subsequent contracts, which could only have been curbed if Congress had explicitly done so in the Ak-Chin Settlement Act. In other words, under the court of appeals' decision, the Secretary's authority under the BCPA to allocate Colorado River water is not limited by the contracts into which he enters.[13]

This remarkable view of the Secretary's § 5 authority also underlies the court's view of the Districts' contracts. As the

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[13]The court of appeals states that the Districts "do not seriously dispute that the Secretary retained his discretion to allocate and reallocate CAP water under the 1983 notice and under their subcontracts with the CAWCD." App. A at 18a n.17. This statement is nothing short of astonishing. The Districts most certainly did -- and do -- contest the proposition that the Secretary retained the authority to reallocate water committed under their contracts; indeed, that is the central issue of this suit.

court of appeals recognized, the Districts argued that "their property interest in the excess Ak-Chin water springs from both their 1983 subcontracts with the CAWCD, and from the Ak-Chin Settlement Act." App. A at 12a. Yet, the court concluded that the Districts had no property interest in the relinquished Ak-Chin water without ever construing the Districts' subcontracts (or the 1983 Allocation Decision upon which they were based) to determine what effect they had -- and what rights they conferred -- to water committed to "the Central Arizona Project." Rather, the court stated that the legitimacy of the Districts' claim to the water disputed here "depends upon [the court's] construction of the Ak-Chin Settlement Act," and denied the Districts' claims based solely on the language of that Act. *Id.* at 13a. Thus, the court of appeals necessarily held that the Districts could not have held an enduring property right through their contracts.

This decision, that the Secretary retains authority under the BCPA to reallocate even contracted-for allocations without compensation, is a truly radical development in federal reclamation law generally and the BCPA in particular, which if allowed to stand, has broad and troubling implications for all who have come to depend on the water they receive pursuant to the Secretary's water delivery contracts.

2. *The Court of Appeals Held That A Broad Disclaimer Clause in the Secretary's Master Repayment Contract With CAWCD Absolves the Government of Liability Under the Subcontracts When It Provides that Same Water To Another User.*

Reinforcing its extraordinary view of the Secretary's § 5 authority to "allocate [, contract] and reallocate" Colorado River water, the court of appeals held that ¶ 8.12 of the Secretary's

Master Repayment Contract with the CAWCD also absolved the government from liability to the Districts in this case. That provision states:

> "*No Guarantee of Availability of Water.* The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States . . . be liable for any damages . . . arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping."

App. J at 95a.

At the outset, we note that despite its "for any cause whatsoever" language, the court of appeals' interpretation of this provision is hardly the most reasonable one. Rather, the language and context of the provision appear plainly to indicate that the parties intended to absolve the government from liability for water non-delivery due to forces beyond its control or other practical considerations unrelated to allocation decisions. The section is specifically addressed to the "availability" of water for delivery, and to the government's desire to avoid making any guarantees "with respect to the quantity of water available for delivery" in the arid west. *Id.* Moreover, the specific examples given of "suspension[s]," "reduction[s]," or "shortage[s]" for which the government will not be liable all involve causes far removed from allocation

policy: "drought, delay in the construction of the Navajo [Power] Project, the failure of the Navajo Project to be completed, or the lack of power for pumping." Although admittedly that list does not purport to be exclusive, the common theme, coupled with the clause's focus on the "availability" of water, compels the conclusion that this clause was intended to absolve the government from liability for shortages or reductions in the manner of a typical *force majeure* clause. Thus, as the district court held, under this provision the Districts "did not bear the risk that the Secretary would remove water . . . to satisfy one of its independent obligations." App. C at 40a.

This interpretation of ¶ 8.12 is further confirmed by ¶¶ 4.1 and 4.4(b)(i) of the Districts' subcontracts, which obligate the Secretary to "use all reasonable diligence to make available to the [Districts] the quantity of Project Water [requested by the Districts]," and to "use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract." *Id.* These explicit obligations preclude a finding that ¶ 8.12 of the Master Repayment Contract should be interpreted to excuse the government from making *any* effort to comply with its obligations, and indeed to sanction the government's deliberate efforts to frustrate the Districts' contracts. Cf., *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 800 (1993).

Through its strained interpretation of the Secretary's Master Repayment Contract, the court of appeals has apparently given the Secretary *carte blanche* to relieve the government of any liability -- or any actual obligations -- under its water supply contracts. This is a development with very broad impact: the decision obviously will affect all other Arizona subcontracts held by municipal, industrial, and non-Indian agricultural users with rights to CAP water. In addition, because provisions similar to ¶ 12.8 are common to reclamation contracts through-

out the West, see Benson, 16 Va. Envtl. L.J. at 394 & n.179, this aspect of the court of appeals' decision will potentially impact many of the 2,700 other "major" reclamation water delivery and repayment contracts.[14]

3. The Court of Appeals Fundamentally Misconstrued The Ak-Chin Settlement Act, and Thus Deprived Arizona Municipal, Industrial, and Non-Indian Agricultural Users of Water Previously Committed to Them Under Their Contracts Without Compensation.

The court of appeals, before reaching the broader issues concerning the Secretary's allocation authority under § 5 of the BCPA and the impact of his allocations and water supply contracts, held that the Districts did not have a protected property interest in the water reallocated to the San Carlos Apache because "the Ak-Chin Settlement Act conferred upon them no protectable property interest." App. A at 12a. In reaching this conclusion, the court misconstrued the Ak-Chin Settlement Act and thereby deprived the Districts, as well as all other municipal, industrial, and non-Indian agricultural CAP users in central Arizona, of important rights under their contracts.

As discussed above, the relevant language of the Act was proposed by Senators Goldwater and DeConcini in order to settle a dispute between the Secretary and Arizona interests, including the Governor, two state agencies, and non-Indian M&I and agricultural users over the Secretary's right to use

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[14]There are 133 federal reclamation projects in the western United States, constructed at a cost of $21.8 billion, and 2,700 associated "major" water delivery and repayment contracts. Western Water Policy Review Advisory Commission, Water in the West: Challenge for the Next Century, at 2-9 (June 1998).

50,000 acre-feet of water for which the Yuma-Mesa district had contracted many years before, but which it had never used. The Arizona interests believed that that water was by law already included in the CAP and therefore subject to existing contracts, so that to allocate that water to the Ak-Chin would reduce the available water supply to which M&I and non-Indian agricultural users were entitled. The Secretary disagreed. See *supra*, pp. 7-9.

To settle this dispute, the Arizona Senators, who sponsored the Ak-Chin Settlement Act and brokered its compromise, included in the Act language specifying that while the Secretary would be permitted to allocate the 50,000 acre-feet of disputed Yuma-Mesa water to the Ak-Chin, he would be directed to allocate a portion of the water previously allocated to the Ak-Chin, but to which the community was no longer entitled, "to the Central Arizona Project." The Arizona non-Indian interests thus dropped their opposition to the Ak-Chin Settlement Act.[15] The history of the Ak-Chin Settlement Act is clear on this point, and indeed the government in this case has not disputed it.

Under these circumstances, as the district court found, it is inconceivable that the Act's requirement that the Secretary allocate the excess Ak-Chin water "to the Central Arizona Project" meant that the Secretary retained the discretion to allocate that water for the exclusive use of an Indian tribe -- or, for that matter, to any other individual user. It was the Secretary's intent to reduce the amounts committed to non-Indian users under their contracts by 50,000 acre-feet that

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[15]See *e.g.*, 130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) (statement of Sen. DeConcini) (included in the record below in the Appellant's Excerpt of Record at 129) ("The . . . amendment clarifies . . . that any water that is not utilized by the Ak-Chin community will revert to the State for use by its CAP customers."); *supra*, pp. 8-9.

sparked the conflict in the first place, and so under the Secretary's interpretation, these users agreed to settle their claims to this water for nothing. This is hardly a plausible reading of the statute. Rather, as the district court held, the Ak-Chin's reference to "the Central Arizona Project" logically refers to the general CAP pool. App. C at 40a.

By committing the water to the general CAP pool, moreover, the Ak-Chin Settlement Act necessarily confirmed that the water would be subject to the 1983 Allocation Decision and the Arizona users' contracts. As described above, the Secretary declared in his 1983 Allocation Decision that he had "elected to allocate waters developed by the . . . (CAP) . . . for the delivery of Arizona's *remaining entitlement* to Colorado River water." App. H at 61a (emphasis added). His allocations thus explicitly included all of the Colorado River water to which Arizona users are entitled under the BCPA, less any amounts that had already been developed, or harnessed and put to use, and which had not then been "developed by the . . . (CAP)." *Id.* The CAP pool thus had been fully allocated in 1983.

Based on the State of Arizona's recommendations with respect to non-Indian users and his own determinations of individual tribal requirements, the Secretary purported to give specific entities the right to contract for concrete water rights: he made specific individual allocations to twelve Indian tribes or communities, similar specific allocations to eighty-five M&I users, and specified percentages of *all remaining supplies* to non-Indian agricultural users. App. H at 71a. The Secretary's Allocation Decision stated that the amount of water that would be made available to the non-Indian agricultural users from the CAP would include (1) the portion of the CAP supply not allocated to Indians and M&I users and (2) the unused portions of those senior allocations. App. H at 80a.

The Secretary then entered into contracts with the individual entities within the three allocation categories. Based on those contractual rights, since 1985 CAP water has been delivered to Arizona users, including the Districts, and put to reasonable beneficial use.[16] Not having reserved any authority to further amend the 1983 allocations on which the Districts' contracts were based,[17] the Secretary was no longer able to increase the higher priority users' allocations, and thus upset the priority expectations created by the Allocation Decision and implementing contracts, without breaching his express contractual commitments, as well as his implied obligation of good faith and fair dealing. See, *e.g.*, *Orange Cove*, 28 Fed. Cl. at 800.

It is clear, then, that if the water relinquished by the Ak-Chin was part of the CAP, it, like the rest of the CAP pool, was irrevocably committed under the 1983 Allocation Decision and implementing contracts. The Districts and other Arizona users believed, of course, that that water *was* part of the CAP and subject to their contracts -- even in the absence of the Ak-Chin Settlement Act. However, that Act removed any doubt that there may have been, by expressly stating -- in settlement of an identical dispute over the Yuma-Mesa water -- that the "Secretary shall allocate [the water relinquished by the Ak-

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[16]The CAP facilities were not fully completed until 1993. Prior to that time, the Districts were taking as much of their contract entitlements as they could get through interim delivery arrangements with the Secretary.

[17]The Secretary retained the authority to further allocate any of the proposed allocations that were not contracted for, App. H at 62a, and in fact, the Secretary subsequently carried out a second round of allocations for the uncontracted-for percentages of the non-Indian agricultural pool. See 57 Fed. Reg. 4470 (1992). The Secretary also retained jurisdiction over any unused contractual entitlements until such time as they were needed by the contractors. App. H at 64a. He did not otherwise reserve any authority to amend the allocations, however.

Chin] on an interim basis to the Central Arizona Project." § 2(k), 98 Stat. 2701, App. F at 57a.[18] The Secretary and the CAWCD then further confirmed this interpretation of the Ak-Chin Settlement Act by amending the Master Repayment Contract in 1988 to specify that the "Project water" delivered to non-Indian subcontractors pursuant to the Secretary's 1983 allocations and implementing contracts includes the water relinquished by the Ak-Chin. App. J at 94a-95a.

Because it misinterpreted the Ak-Chin Settlement Act to permit the Secretary to allocate the excess Ak-Chin water to any "CAP user" rather than "to the CAP," the court of appeals allowed the Secretary to remove a significant amount of water -- 33,300 acre-feet -- from the pool expressly committed, through their respective contracts, to M&I and non-Indian agricultural users, and commit it instead to an Indian tribe outside the established priorities without compensation. This error thus has a significant impact, directly affecting the water rights of all

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[18]Although this is not the focus of its decision, the court of appeals seemed to believe that the Act's use of the word "interim" supported its view that the government was free to revoke its allocation of water to the CAP. See App. A at 19a. In the context of western water law and rights, however, allocations are sometimes described as "interim," meaning only that the allottee or user does not have an absolute entitlement to a specific quantity of water simply because it may have received that quantity in an earlier year. For example, junior water users are entitled to use senior unused water on an interim, nonpermanent basis until it can be put to use by the senior users. This linchpin of western "prior appropriation" water allocation systems promotes the most efficient use of a limited water supply. See, *e.g.*, App. H at 64a, 71a-72a, 72a. (Secretary retained right to contract for sales "on an interim basis where . . . water allottees are not utilizing the full CAP allotment . . ."). In this case, the allocation to the CAP had to be "on an interim basis," because in dry years some or all of that 33,300 acre-foot allocation might be required for delivery to the Ak-Chin. The word does *not* mean that the allocation itself -- the right to use water when available -- can be revoked, as the court of appeals apparently assumed.

non-Indian CAP users -- cities, towns, major industries, and agricultural producers -- in Arizona.[19] Moreover, the precedent will haunt future Indian water rights settlements in Arizona and elsewhere in the West.

II. THE NINTH CIRCUIT'S USE OF THE "UNMISTAKABILITY DOCTRINE" DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *UNITED STATES V. WINSTAR CORP.*

Relying exclusively on Ninth Circuit precedent decided prior to this Court's 1996 opinion in *United States v. Winstar Corp.*, 518 U.S. 839, the court of appeals held that the Districts could not prove that they had a property right to the water committed to the CAP in the Ak-Chin Settlement Act unless they proved that Congress in that statute had eliminated both the Secretary's and its own discretion to reallocate that water in "unmistakable terms": "Because we are wary of constructions that would give government contracts the force of indelible laws, we assume that '[t]he sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures . . . unless surrendered in unmistakable terms.'" App. A at 18a, 19a (citation omitted).

Thus, the court of appeals ignored traditional principles of contract interpretation, under which the district court had concluded that the government had indeed committed to allocate the water disputed here to the general CAP pool for use under its existing allocations and contracts. Instead, the court of appeals, assuming for discussion purposes the correctness of

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[19]Although the M&I users' specific, quantified allocations have not been reduced, increasing the San Carlos Apache allocation affects their contracts by making it less likely that the water will be available to fully satisfy their contractual allocations. In a dry year, it is these users that will suffer the effects of the court of appeals' decision.

that interpretation, nevertheless held that neither the language of the Ak-Chin Settlement Act nor the Districts' contracts "unmistakably" committed the government to that allocation and that therefore both the Secretary and Congress were free to reallocate that water at any time. *Id.* at 20a-21a.[20]

The court of appeals' use of the "unmistakability doctrine" in this way -- and its resulting conclusion that the government may simply walk away from its commitment to allocate water to Arizona users under the CAP structure -- directly conflicts with this Court's *Winstar* decision. In *Winstar*, a majority of this Court unequivocally held that the government's contractual promises are to be analyzed and discerned using ordinary principles of contract interpretation, and that the "unmistakability doctrine" does not require a "second promise" not to breach its contractual agreement before the government may be held liable in damages for breaching a promise so discerned. See *Winstar*, 518 U.S. at 887. Thus, in *Winstar* this Court held that the government was liable to three savings and loan associations ("thrifts") for breaching its promise to accord them particular accounting treatment in connection with their acquisition of other, failing thrifts in the early 1980s, despite the fact that the contracts did not explicitly state that the government would not thereafter change the accounting regulations applicable to thrifts.

The principal *Winstar* opinion, authored by Justice Souter, held that the "application of the [unmistability] doctrine . . . turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Id.* at 878. Because in *Winstar* the thrifts were

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[20]As the court of appeals recognized, Congress can make contractual commitments to private parties through legislation. See *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937).

not seeking to enjoin the issuance or application of the new regulations, the principal opinion held that the doctrine did not apply. It also stressed that inappropriate use of the doctrine would be "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies" and cited as an example the type of contract at issue here: "contracts to dispose of federal property." *Id.* at 883, 884.[21]

Justice Scalia's concurring opinion reasoned that the "unmistakability doctrine" did apply to the case, but that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* at 920. Because "the special role of the agencies, and the terms and circumstances of the transactions, provide[d] an adequate basis" for the lower courts' findings that the government had promised to provide the thrifts with particular regulatory treatment in that case, the concurring opinion also concluded that the unmistakability doctrine did not absolve the government from liability. *Id.*

In flat disobedience to both the principal and concurring opinions in *Winstar*, which it did not cite, the court of appeals in this case held (1) that the "unmistakability doctrine" does apply to the government's contractual commitments to provide water to the Districts, and (2) that the doctrine substitutes for "normal principles of contract interpretation" a requirement that to be held to a promise, the government must explicitly state that it will not later change its mind. Thus, the court declared that even if the water surrendered by the Ak-Chin had been allocated and committed to the Districts under their contracts

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[21]Indeed, the principal opinion in *Winstar* identified a "supply contract" as one to which "no one would seriously contend that . . . the unmistakability doctrine [might apply]." *Id.* at 880.

and the Ak-Chin Settlement Act, it could find nothing that "purport[ed] to limit Congress's power to command a reallocation later." App. A at 20a.

First, as in *Winstar*, enforcement of the government's trust obligations to the San Carlos Apache tribe will not be blocked by requiring the government to compensate the Districts for taking their water to satisfy that obligation. Second, as discussed above, the facts and circumstances surrounding the 1983 Allocation Decision and implementing contracts, as well as the Ak-Chin Settlement Act, make plain that the water surrendered by the Ak-Chin "to the Central Arizona Project" was committed to the Districts and other Arizona CAP users under the existing CAP allocations and contracts. As in *Winstar*, if the government had promised only to commit that water to the CAP "'unless and until there [was] subsequent [inconsistent] action,'" then the government's commitment to the Districts in the contracts and the Ak-Chin Settlement Act was "an absolutely classic description of an illusory promise." *Winstar*, 518 U.S. at 921. But as Justice Scalia stated, "[i]n these circumstances, it is unmistakably clear that the promise . . . must be understood as (unsurprisingly) a *promise* . . . [U]nmistakability [does not] demand[] that there be a *further* promise not to go back on the promise . . . ." *Id.*

As a result of its failure to consider this Court's *Winstar* decision, as well as its importation of the "unmistakability doctrine" into an analysis of whether the government may be held to an ordinary promise to supply goods -- here, water -- the court of appeals held that the government may indeed make "illusory promises." Given the leading role that the court of appeals' decision in this case is likely to play, at least in the development of the law governing the Secretary's thousands of water supply contracts throughout the West, if not in Ninth Circuit government-contract law generally, it is a dangerous precedent warranting correction by this Court.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 12, 1999

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APPENDIX A

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona; and NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona, Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.
No. 97-16432.

United States Court of Appeals For the Ninth Circuit.

Argued and Submitted May 12, 1998.
Decided July 7, 1998.
Opinion Withdrawn Oct. 14, 1998.
Decided Oct. 14, 1998.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding.
D.C. No. CV-94-02188-SMM.

Before GOODWIN, PREGERSON, and FERGUSON, Circuit Judges.

OPINION

PREGERSON, Circuit Judge:

BACKGROUND

The Colorado River and its tributaries are the major sources of water in the arid Southwest. Careful in the years of drought, the United States has established reclamation projects to channel water where it is needed most and to head off disputes among water users. But in its efforts to settle some water rights

disputes, sometimes the government creates others. This case involves one such dispute. A working familiarity with the history of water rights legislation in the Southwest is essential to a full comprehension of this controversy.

Shortly after the first World War, legislators considered ways to regulate and capture for beneficial use Colorado River flood flows that annually were lost. A dam in Arizona with a canal to California was contemplated. Plans like this one worried inhabitants of the Upper Basin states (Colorado, Utah, New Mexico, and Wyoming), who knew that water rights might be lost forever to the states in the Lower Basin (Arizona, Nevada, and California) under the doctrine of prior appropriation. To forestall water rights disputes, Congress ratified the Colorado River Compact in 1922. *See* Act of August 19, 1921, art. 2, 43 Stat. 171, *reprinted in* Ariz.Rev.Stat. § 45-1311. Among other things, the Compact apportioned 7.5 million acre feet ("AF") of water annually to the states in the Lower Basin.[1]

But the Compact did not apportion water among the states. The Boulder Canyon Project Act of 1928 parceled water among the Lower Basin states, allotting Arizona 2.8 million AF annually.[2] *See* 43 U.S.C. § 617 (1998). This Act also gave the Secretary of the Interior broad administrative authority over the water, including the power to apportion water within the states. *See id.* The Supreme Court confirmed the Lower Basin apportionment in 1963 and recognized the breadth of the Secretary's discretion to allocate Colorado River water.

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[1]The Compact guaranteed an equal amount of water to the Upper Basin states. The Upper Basin water supply is not at issue in this lawsuit.

[2]California received 4.4 million AF annually, and Nevada annually was entitled to 300,000 AF. Neither of these water apportionments is at issue in this suit.

Arizona v. California, 373 U.S. 546, 579-80, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

The Colorado Basin Project Act was enacted in 1968 to apportion water among the regions of Arizona. *See* 43 U.S.C. §§ 1501-1556 (1998). This Act authorized the Secretary of the Interior to build, operate, and maintain the Central Arizona Project (the "CAP"), which allocates Arizona's share of Colorado River water after other users with perfected rights take their water. *See id.* at § 1521. The Act also permitted the Secretary to contract for the repayment of CAP construction costs with a single political subdivision in Arizona. *See id.* at § 1524. In 1971, Arizona created this subdivision: the Central Arizona Water Conservation District (the "CAWCD"). *See* Ariz.Rev.Stat. § 48-3701 *et seq.* (1985). In addition to its duty to contract with the Secretary to finance the CAP, the CAWCD was responsible for subcontracting with users to deliver CAP water and to levy a property tax that partly would offset the CAP's construction and operating costs.

The Secretary was left to devise and implement a system for determining how and to whom CAP water would be sold. The Secretary settled upon an allocation-contract mechanism for distributing CAP water. First, in 1983, the Secretary apportioned the right to purchase CAP water by way of general allocations to three priority pools, in descending order of priority: Indian tribes, municipal and industrial users, and non-Indian agricultural users. *See* CAP Water Allocations, Fed.Reg. 12446-49 (1993) (the "1983 notice").[3] Within those pools, the

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[3]In the years preceding the final allocations published in the 1983 notice, the Secretary considered and rejected all six allocation methods proposed by various public and private entities. Instead, the Secretary adopted a system that represented an amalgam of two of the proposals he had heard. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12446 (1983). The Secretary decided that the Indian tribes, which include the Ak-Chin and the San Carlos

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Secretary allotted CAP water to specific users.[4] Second, after the CAP water was allocated, the allottees could purchase CAP water by way of subcontracts with the United States and the CAWCD. These contracts--and not the allocations themselves--determined how much water CAP allottees actually were entitled to receive.[5]

FACTS AND PRIOR PROCEEDINGS

The plaintiffs are irrigation districts (the "Districts") who were allotted percentages of the non-Indian agricultural pool in the 1983 notice. Each of the Districts entered into a subcontract with the United States Department of the Interior and the CAWCD in November 1983. Pursuant to their contracts, the Districts collectively were scheduled to receive forty-three percent of the CAP non-Indian agricultural water supply. As consideration for these subcontracts, the Districts promised to

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[3](...continued)
Apache Tribes, could contract for up to 309,000 AF of water from the CAP. *See* CAP Water Allocations, 48 Fed.Reg. at 12447. Municipal and industrial users were entitled to contract for as much as 640,000 AF of CAP water. See CAP Water Allocations, 48 Fed.Reg. at 12447-49. The non-Indian agricultural pool was allotted the right to contract for whatever CAP supply remains after the tribal, municipal, and industrial users purchased the water allotted to them in 1983. See CAP Water Allocations, 48 Fed.Reg. at 12449.

[4]Users in the Indian and municipal and industrial pools each were allocated specific acre-footage amounts of CAP water. The users in the lowest-priority non-Indian agricultural pool each were allotted a percentage of the remaining 1983 CAP supply, as projected in the 1983 notice.

[5]Under the CAP hydraulics, the allocations listed in the 1983 notice determined how much CAP water that the various pools and users could purchase. Water "availability," which was impacted by the demands of higher-priority users and drought conditions, determined the quantity of water that CAP users *actually* could buy. *See* CAP Water Allocations, 48 Fed.Reg. 12446-49 (1983). Within these parameters, how much water CAP users received was limited only by their demand. Thus, users who wanted to receive the CAP water allotted to them were required to contract for it.

repay the costs involved in constructing the facilities needed to deliver their CAP water and paid twenty percent in advance.

In 1984, after the Secretary of the Interior announced his allotments and after the Districts contracted for their allotted shares of the residual CAP water, Congress entered into a water-rights settlement with the Ak-Chin Tribe. *See* Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2701 (1984) (the "Ak-Chin Settlement Act"). Therein, Congress directed the Secretary of the Interior annually to deliver a permanent supply of 75,000 AF of CAP water to the Ak-Chin Indian Community,[6] or 85,000 AF of water when sufficient water was available. Congress specified the sources and priorities of the water that the Ak-Chin would receive. First, Congress directed the Secretary to allocate to the Ak-Chin Tribe some 50,000 AF of Colorado River water which the Yuma-Mesa Division had abandoned, and which the Secretary had not included in the CAP when he made his 1983 allocations.[7] Second, Congress

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[6]The Ak-Chin Community is an Executive Order reservation located approximately 30 miles south of Phoenix, Arizona.

[7]In the proceedings leading up to the Ak-Chin Settlement Act, Congress heard the Districts complain that the Yuma-Mesa Division water was already part of the CAP and thus, unavailable for allocation to the Ak-Chin Tribe. Ultimately Congress rejected the Districts' complaint, allocating the unused Yuma-Mesa Division water to the Ak-Chin Tribe and allocating the excess Ak-Chin water to the CAP. *See* Act of Oct. 19, 1984, Pub.L. 98-530, §§ 2(f)(1), 2(k), 98 Stat. 2698, 2699, 2701 (1984).

In an effort to show that they relinquished something of value in exchange for Congress's allocation of the excess Ak-Chin water to the CAP, the Districts renew their argument that the Yuma-Mesa Division water already was allocated to the CAP when Congress diverted that allotment to the Ak- Chin Tribe in 1984. There simply is no evidence that the Secretary ever allocated this water to the CAP. *See* Letter from James Watt, Secretary of the United States Department of the Interior, to Congressman Morris D. Udell 6 (Oct. 7, 1983) (stating that the Yuma-Mesa Division water "has not

(continued...)

specified that the Ak-Chin Tribe would keep the 58,300 AF of CAP water allotted to it in the 1983 notice. But because these two sources together produced 23,300 to 33,300 AF more water than the Ak-Chin Tribe was entitled to under the terms of the settlement, Congress stated that the Secretary "shall allocate" this excess Ak-Chin water "on an interim basis to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2701 (1984).

The excess Ak-Chin water allocation remained in the CAP for eight years. In the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Congress provided that the excess Ak-Chin CAP water would be reallocated to the San Carlos Apache Tribe. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, §§ 3701-3711, 106 Stat. 4740 (the "SCAT Act"). The Districts urged Congress to return the excess Ak-Chin water to the "Central Arizona Project," as the Ak-Chin Settlement Act directed. Congress rejected that plea, but included in the SCAT Act a waiver of sovereign immunity for suits based on a CAP contractor's claim that the SCAT Act unlawfully deprived him of legal rights to the excess Ak-Chin water allocation.

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[7](...continued)
been included in calculations of the water committed to the CAP").

What Arizona representatives may have hoped is irrelevant to whether the water actually was allocated to the CAP. Likewise, whether officials from the Bureau of Reclamation and the Arizona Water Commission may have projected that the Yuma-Mesa Division water would be included in the CAP is immaterial. The Secretary is not obliged to accept those projections. *See* Central Arizona Project, 45 Fed.Reg. 81265, 81271 (1980) (rejecting the projections of CAP water availability made by two state agencies). For these reasons, we recognize that the Districts have not created a genuine issue of material fact that the Yuma-Mesa Division water was included in the allocations published in the 1983 notice.

On October 28, 1994, the Districts sued the United States in district court.[8] In their suit, the Districts contended that the SCAT Act had taken their rights to the excess Ak-Chin water allocation without just compensation. On December 15, 1995, the parties filed cross-motions for summary judgment on the issue of liability only. The court granted the Districts' motion on February 21, 1997.

The government timely appeals.[9] The Districts request attorneys' fees on appeal pursuant to 28 U.S.C. § 2412(d)(1). As we explain below, we reverse the district court's grant of summary judgment to the Districts, and we deny their request for fees.

ANALYSIS

I.

[1-3] We have jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We review the district court's grant of summary judgment de novo. *See Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830, 834 (9th Cir.1997). Jurisdictional issues, including questions of standing, also are reviewed de novo. *See San Diego Co. Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1124 (9th Cir.1996). The construction of

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[8]Neither the Ak-Chin nor the San Carlos Apache Tribe is involved in this controversy. Because the Districts are seeking damages rather than injunctive relief, the outcome of this case will have no effect on the rights secured to those tribes in their respective settlements with the United States.

[9]The Salt River Project Agricultural Improvement and Power District (a political subdivision of Arizona) and the Salt River Valley Water User's Association (an Arizona corporation) were parties to the SCAT Act. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3705(a), (c), 106 Stat. 4740, 4744-45 (1992). Both filed an amicus brief in support of the government, arguing that the Districts lacked standing to sue under SCAT Act and that the district court therefore lacked jurisdiction.

a statute is reviewed de novo. *See United States v. Hockings,* 129 F.3d 1069, 1070 (9th Cir.1997).

II.

[4] For the first time on appeal, the amici argue that the Districts lack standing to sue under the SCAT Act. Generally, issues not raised in the district court cannot be asserted on appeal. *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 673 (9th Cir.1993). But because "Article III standing is a jurisdictional prerequisite," *Hickman v. Block,* 81 F.3d 98, 101 (9th Cir.1996) (citation omitted), we must consider standing whether or not the issue was raised in the district court. *See Firebaugh Canal,* 10 F.3d at 673.

[5] The Districts bear the burden of demonstrating that they had standing to bring their action. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559- 61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing, the Districts must show three things:

> First, [the Districts] must have suffered injury to a legally protected interest. This injury must be both concrete and particularized, and actual or imminent rather than conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, the injury must be redressable by a favorable judicial decision.

Hickman, 81 F.3d at 101 (quoting *Lujan*, 504 U.S. at 559-61, 112 S.Ct. 2130) (citations and internal quotation marks omitted). Amici insist that we lack jurisdiction of this controversy because the Districts have not alleged a particularized injury to a legally protected interest. Amici advance three arguments in support of this position.

[6] First, amici point out that only CAP contractors have standing to sue under the SCAT Act. The pertinent provision states:

> (f) CLAIMS. --(1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide any claim brought by the [CAWCD] *or other contractors of CAP water.* Any such claim shall be filed within two years of the date of enactment of this Act, and shall be heard by the court on an expedited basis. If such a claim is filed and the court grants judgment for the plaintiff(s), the court shall award such relief as it deems proper, and shall award costs and attorneys' fees to the plaintiff(s). Any judgment of the court shall be subject to appeal on the same basis that other judgments of that court are subject to review under existing law.

San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102- 575, tit. XXXVII, § 3709(f)(1), 106 Stat. 4740 (1992) (emphasis added). Amici argue that the Districts relinquished their status as CAP contractors--and correspondingly, their standing to sue under the SCAT Act--when they waived all of their rights to non-Indian agricultural CAP water pursuant to the 1993 amendments to their subcontracts. This argument lacks merit. Assuming that these amendments were binding, none of them purported to terminate the Districts' subcontracts with CAWCD.[10] Although Congress did not define the term "contractor" in the SCAT Act, a reasonable construction of the term would include all entities that had contracted for residual CAP water at the time of the Act--even those who, like the Districts, subsequently amended

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[10]Quite to the contrary, the terms of the amendments made clear that the parties did not intend to extinguish Districts' rights to seek redress for any taking that the SCAT Act effectuated. Although the intention of the parties is not dispositive of the issue of standing because the parties may not confer Article III jurisdiction on this court, each of the Districts signed CAWCD proposals which stated: "Nothing herein is intended to require or imply that [Districts have] waived any rights or claims which [they] may have against the United States pursuant to § 3708(f) of the [SCAT Act]."

their subcontracts. And even if the Districts no longer have any contractual right to draw residual CAP water, that fact would bear on the assessment of damages, not the question of liability.

[7] Second, amici argue that the Districts lack standing because they failed to show an actual injury, maintaining that the Districts have not demonstrated an actual reduction in the amount of CAP water available to them so far. The amici underestimate the breadth of the SCAT Act's waiver of sovereign immunity. The SCAT Act did not require a CAP allottee to prove that Congress's compromise with the San Carlos Apache Tribe made less water available to him. Instead, the SCAT Act waived sovereign immunity to any "claim that the reallocation of water to the Tribe pursuant to [this] Act has unlawfully deprived the [CAWCD] or other contractors of CAP water *of legal rights to such water*." San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3708(f)(2), 106 Stat. 4740 (1992) (emphasis added). The Districts allege that, by reallocating the excess Ak-Chin water to the CAP, the Ak-Chin Settlement Act automatically reallocated that water to the non-Indian agricultural pool, which water the Districts had purchased under their 1984 subcontracts. If the Districts are correct in their assertion that the excess Ak-Chin water defaulted to them, then the SCAT Act's reallocation of the excess Ak-Chin water to a higher-priority user directly decreased the size of the non-Indian agricultural users' allocations and indirectly deprived the Districts of water due them in their subcontracts. Because a higher-priority right to a CAP water allocation is more valuable than a lower-priority right to the same water, the Districts adequately have alleged that the SCAT Act deprived them of their legal rights to the excess Ak-Chin water allocation.

[8] Third, amici argue that any damage that the Districts may sustain in the future is "conjectural or hypothetical" because their subcontracts only entitled them to an annual percentage of an uncertain amount of residual CAP water. Although we

recognize that the extent of the Districts' injury is not easily measured, determining the harm they may suffer is not merely guesswork. If the SCAT Act reallocated water that became the Districts' property under the Ak-Chin Settlement Act, then the harm is certain even though its precise valuation may not be. Nor does the ebb and flow of the CAP water supply or the fact that the Districts' losses cannot be measured to the ultimate drop render their past damages speculative. The Supreme Court expressly has declined to hold that "the absence of specificity as to the amount of water to be taken prevents the assessment of damages." *Dugan v. Rank*, 372 U.S. 609, 623, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).[11] And because the Districts' subcontracts oblige them to repay some portion of the CAP's construction costs, any reduction in the non-Indian agricultural pool's allocation would reduce the maximum amount of CAP water and would limit the revenues that the Districts could generate to repay those contractual obligations. We have found standing in similar circumstances. *See Central Ariz. Water Conservation Dist. v. United States Envtl. Protection Agency*, 990 F.2d 1531, 1539 (9th Cir.1993) (holding that the CAWCD had standing to litigate an EPA rule that would require a hydroelectric plant on the Colorado River to buy and install emissions-control devices, where the Bureau of Reclamation owned the plant and the CAWCD was obliged to pay a share of the Bureau's costs).

In sum, the Districts have alleged a concrete injury. The amici do not allege that the other standing requirements are absent, but the Districts have established that the SCAT Act caused any injury they may have suffered, and that we have the power to redress such an injury. See *Hickman*, 81 F.3d at 101.

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[11]The Court noted further that although "the Government did not announce that it was taking water rights to a specified number of 'gallons' or, for that matter, 'inches' of water, we do not think that this quantitative uncertainty precludes ascertainment of the value of the taking." *Id.*

Because the Districts have standing to sue under the SCAT Act, we must reach the merits of this case.

III.

The Districts insist that Congress abrogated their subcontracts with the CAWCD by directing the Secretary to reallocate the excess Ak-Chin water to the San Carlos Apache Tribe in the SCAT Act. The federal government may not deprive a person of "property without due process of law." U.S. Const. amend. V. To demonstrate a wrongful taking, the Districts must show two things. First, the Districts must demonstrate a protected property interest in the excess Ak-Chin water. *See Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 807 (9th Cir.1990). Second, if the Districts can show a protected interest in the excess Ak-Chin water, they must show that the SCAT Act substantially impaired their contractual rights to that property. *See National R.R. Passenger Corp. v. A.T. & S.F.R. Co.*, 470 U.S. 451, 472, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985).

The Districts allege that their property interest in the excess Ak-Chin water springs from *both* their 1983 subcontracts with the CAWCD, and from the Ak-Chin Settlement Act. The Districts' subcontracts can be the wellspring of property rights. *See id.* at 465-66, 105 S.Ct. 1441; *see Madera Irrig. Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir.1993) (holding that "a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment"). Because we are asked to construe the Districts' subcontracts, we must interpret them "against the backdrop of the legislative scheme that authorized them, and ... in light of the policies underlying the controlling legislation." *Peterson*, 899 F.2d at 807. Likewise, the Ak-Chin Settlement Act could have conferred on the Districts a property interest in the excess Ak-Chin water. *See Dodge v. Board of Educ. of City of Chicago*, 302 U.S. 74, 78, 58 S.Ct. 98, 82 L.Ed. 57 (1937) (stating that the government can incur contractual obligations "where a statute confirms a

settlement of disputed rights and defines its terms") (footnote omitted).

[9] The Districts' claim to a property right in the excess Ak-Chin water boils down to two observations and an inference. First, the Districts note that the 1983 notice provides that "[t]he CAP water allocations to the non- Indian agricultural users shall include the remaining supplies and are expressed as percentages of water available to non-Indian agriculture." CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983). Next, the Districts point out that the Ak-Chin Settlement Act directs the Secretary to "allocate" the excess Ak-Chin water "on an interim basis to the Central Arizona Project" without naming a specific allottee or class of allottees. Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2702 (1984). From these two textual observations the Districts urge us to infer that, under the terms of the 1983 notice, allocating water to the "Central Arizona Project" rather than to a specific user or user class automatically and irrevocably would allocate that water to the non-Indian agricultural pool.

[10] Whether this inference legitimately may be drawn depends upon our construction of the Ak-Chin Settlement Act. In particular, we must determine what Congress intended when it designated the "Central Arizona Project" as the recipient of the excess Ak-Chin water. "When interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Hockings*, 129 F.3d at 1070 (citation and internal quotation marks omitted). Upon scrutiny of the language in and the policy behind the Ak-Chin Settlement Act, as informed by the legislative structure of the CAP, we conclude that the Act gave the Districts no property right in the excess Ak-Chin water.

First, no language in the Ak-Chin Settlement Act supports the inference that water allocated to the "Central Arizona Project" would fall to the Districts' portions. When Congress

directed the Secretary to allocate the excess Ak-Chin water to the "Central Arizona Project," it used a term defined by statute. Under 43 U.S.C. § 1521, the CAP is a multitude of canals and aqueducts radiating from dams and reservoirs. And in the practical language of the 1983 notice, the CAP is the sum of all the allocations. Neither Congress nor the Secretary ever equated the CAP with one priority pool or a particular user. Whenever Congress has wished to allot water to a specific CAP priority pool or CAP user, it has used clear language to do so.[12] Congress's failure to designate a specific user or user class convinces us that, even if the excess Ak-Chin water generally was available to the Districts before 1992, the Ak-Chin Settlement Act conferred upon them no protectable property interest. *See Central Mont. Elec. Power Coop. v. Administrator,* 840 F.2d 1472, 1477 (9th Cir.1988) (stating that "[i]f Congress intended to establish a Montana preference for Libby power, it would have expressly set forth a preference as it did when it authorized construction of the Hungry Horse Dam").[13]

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[12]*See* Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub.L. 100-512, § 11(h), 102 Stat. 2549 (1988) (stating that "the Secretary shall reallocate such water for non- Indian agricultural use"); *see* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3704(a), 106 Stat. 4740 (1992) (directing the Secretary to reallocate the excess Ak-Chin water "for the exclusive use of the [San Carlos Apache] Tribe").

[13]Ordinary contract law principles dictate that *incidental* beneficiaries may not sue on contract. See Rest. of Contracts § 133(1)(c) (1932). Analogously, those who receive a windfall from a federal settlement will not be heard to complain that a taking has occurred when the law subsequently is changed. *See Dodge*, 302 U.S. at 79, 58 S.Ct. 98 (stating that "[i]f, upon construction of a statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right") (footnote omitted).

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Second, the Districts' interpretation of the Ak-Chin Settlement Act finds no support in the meager policy articulated in the Act, whose sole stated objective was to secure for the Ak-Chin Tribe a permanent water supply. *See* Act of Oct. 19, 1984, Pub.L. 98-530, § 1, 98 Stat 2698 (1984). Nor can the Districts' interpretation of the Ak-Chin Settlement Act be squared with the policies and the design of the CAP. As a matter of policy, the CAP was created "[f]or the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona ... control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes." 43 U.S.C. § 1521(a) (1998). The other purposes include ensuring the repayment of the CAP's own construction and operation costs, and keeping as little of the Colorado River as possible from evaporating or flowing unused into the Sea of Cortez. *See* 43 U.S.C. §§ 423(e), 1524(c) (1998). These purposes are furthered by the Secretary's trickle-down construction of the CAP, which aims to maximize CAP use (and incidentally, to minimize waste) by prioritizing the contract rights of allottees. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983). Anticipating

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[13](...continued)

The Districts never were more than incidental beneficiaries of the Ak-Chin Tribe's settlement with the government. The Districts were not parties to the Ak-Chin Settlement Act. The United States was not settling a "debt" with the Districts in the Ak-Chin Settlement Act, nor did the Districts provide some other independent consideration for Congress's dispensation of the excess Ak-Chin water to the CAP. In these circumstances, the Districts can claim no property right that can withstand Congress's legislative authority. *See Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 55-56, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986); *see Peterson*, 899 F.2d at 811. Congress's assignment of the excess Ak-Chin water to the "CAP" rather than to the Districts or their priority pool is at best weak evidence of any intent to benefit the Districts, even in light of the wrangling over the Yuma-Mesa Division water.

urban growth and a concomitant decline in agriculture in Arizona, the Secretary gave cities and tribes more secure water entitlements than those possessed by the non-Indian agricultural users. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12451 (1983) (stating that the supply available to non- Indian agricultural allottees would "decrease during the project life"). These purposes are best served by cycling CAP water allocations rights through the whole priority structure rather than by vesting them at the lowest level of that structure, particularly because the non-Indian agricultural pool historically has underutilized its allotments, and has been able to pay less than the other pools for the water that it has utilized. *See generally* Robert J. Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project,* 27 Ariz. St. L.J. 677 (1995) (discussing non-Indian agricultural users' underuse of their allotments and the downward pressure on prices charged of those users relative to the prices charged of municipal and industrial allottees). The Districts' interpretation of the Ak-Chin Settlement Act as giving them a permanent priority entitlement to the excess Ak-Chin water is simply untenable in light of these objectives. As a matter of design, neither contract rights nor allocations automatically default to users by ordinary operation of the CAP. When a user does not contract to receive all the water available to him under his allocation, his right to contract for that water devolves upon the *Secretary*.[14] And post-1983 allocations to the CAP do not fall to a particular user or user class, but remain at the Secretary's discretionary disposal, because the users' allotments were predicated on the amount of water in the CAP

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[14]The 1983 notice provides that "the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water allottees are not utilizing the[ir] full CAP allotment[s]." CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1984). We emphasize that the right to contract for unwanted water belongs to the Secretary, not any one user; and this right affects contracts, not allocations.

in 1983.[15] The way that the Secretary has treated the excess Ak-Chin water between the two Indian water rights settlements is faithful to the CAP allocation structure as we have described it.[16] To hold that the excess Ak-Chin water falls automatically to the Districts would turn the CAP's system of priorities on its head.

[11] Only by ignoring the language and purpose of the Ak-Chin Settlement Act, and only by forgetting the policies and design of the CAP could we conclude that the Districts enjoyed an interest in the excess Ak-Chin water. But even then the Districts could claim no enduring property right unless that interest rose to the level of an entitlement. *See City of Santa Clara v. Andrus,* 572 F.2d 660, 676 (9th Cir.1978). Because the Districts allege that their subcontracts and the settlement *together* created their property interest, they are not entitled to the excess Ak-Chin water unless they prove two things. First, the Districts must prove that Congress eliminated the

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[15]The 1983 notice made it abundantly clear that the lodestar of the non-Indian agricultural pool's allocation always would be whatever supply "remained" after the original round of allocations. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983) (stating that the non- Indian agricultural pool's "allocation for years subsequent to [the original allocation in the 1983 notice] *will be based on the [allocation in the 1983 notice] minus the supply ... removed from irrigation"*) (emphasis added).

[16]The Secretary has not behaved in any way consistent with the Districts' assertion that water allocated to the CAP flowed directly into the non-Indian agricultural pool. Specifically, the Secretary never treated the Districts as having automatic access to this or any other water allocated to the "Central Arizona Project." Quite to the contrary, the Secretary publicly treated the excess Ak-Chin water as remaining in the Indian priority pool between the Ak-Chin Settlement and the SCAT Acts. *See* CAP Reallocation Decision, 57 Fed.Reg. 4470, 4476 (1992) (in which the Secretary stated that "[t]he 'excess Ak-Chin water' has been and continues to be considered as Indian water").

Secretary's discretion to reallocate the excess Ak-Chin water.[17] *See id.* Out of respect for the Secretary's broad discretionary authority over the waters of the Colorado River,[18] we assume that "had Congress intended to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms." *Id.* at 667 (quoting *Arizona v. California,* 373 U.S. at 580, 83 S.Ct. 1468). Second, the districts must demonstrate that Congress clearly foreclosed its own prerogative to order that water reallocated in subsequent legislation. Ordinarily, "contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the

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[17]The Districts do not seriously dispute that the Secretary retained his discretion to allocate and reallocate CAP water under the 1983 notice and under their subcontracts with the CAWCD. In effect the Districts conceded that the 1983 notice preserved the Secretary's discretion to reallocate CAP water when they argued in their briefs that Congress *eliminated* the Secretary's discretion to reallocate the excess Ak-Chin water in the Ak-Chin compromise. The language of the 1983 notice makes crystal clear that the Secretary's discretion over the CAP includes the power to allocate CAP water. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12450 (1983) (stating that "[t]he Secretary of the Interior has the responsibility for allocating CAP waters"). In fact, the Secretary specifically informed allottees that he intended to retain his authority to *reallocate* CAP water even after the notice of "final" water allocations. *See* CAP Water Allocations, 48 Fed.Reg. at 12447 (stating that, after a six-month contracting period, the Secretary for the Arizona Department of Water Resources would recommend that the Secretary of the Interior "reallocat[e] any remaining M & I or non-Indian agricultural water not contracted for during the initial contract period"); *see* CAP Reallocation Decision, 57 Fed.Reg. 4470, 4471 (1992) (confirming that "[t]he 1983 notice provided for a reallocation of the CAP water after an initial round of water service contracting had been completed.")

[18]The Secretary "is vested with considerable control over the apportionment of Colorado River waters." *Arizona v. California,* 373 U.S. at 593, 83 S.Ct. 1468. The Secretary's generous measure of discretion survived the Colorado River Basin Project Act, which directed him to "construct, operate, and maintain" the CAP. *See* 43 U.S.C. § 1521(a).

sovereign." *O'Neill v. United States,* 50 F.3d 677, 686 (9th Cir.1995). Because we are wary of constructions that would give government contracts the force of indelible laws, we assume that "[t]he sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless surrendered in unmistakable terms." *Peterson*, 899 F.2d at 808 (quoting *Bowen*, 477 U.S. at 52, 106 S.Ct. 2390 (internal quotation marks omitted)).

The Districts argue that Congress limited the Secretary's discretion to reallocate the water when it stated that he "shall *allocate* ... on an *interim* basis "the excess Ak-Chin water from the Ak-Chin Tribe "to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat 2698 (1984) (emphasis added). This argument simply does not wash. Even if the term "Central Arizona Project" were synonymous with the non-Indian agricultural pool--an interpretation we already have rejected--nothing in the Ak-Chin Settlement Act prevents the Secretary from reallocating CAP water from the Central Arizona Project to a particular CAP user. In fact, the Ak-Chin Settlement Act actually reaffirms the Secretary's CAP allocation power. By directing the Secretary to allocate CAP water, Congress actually underscored the Secretary's undisputed allocation *authority*.[19] By instructing the Secretary to allocate the excess Ak-Chin water to the "Central Arizona Project" rather than to specific users such as the Districts, and by using the phrase "interim basis" rather than some specific or permanent duration, Congress preserved the Secretary's

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[19]The Ak-Chin Settlement Act provided that "[n]othing in this Act shall be construed to enlarge or diminish the authority of the Secretary with regard to the Colorado River." Act of Oct. 19, 1984, Pub.L. 98-530, § 8, 98 Stat 2698 (1984). Read in light of this provision, Congress's mandate that the Secretary reallocate the excess Ak-Chin water confirms that the Secretary had the discretion to reallocate CAP water after the 1983 allotments.

allocation *discretion*.[20] For these reasons, we hold that the Ak-Chin Settlement Act did not divest the Secretary of his discretion to allocate the excess Ak-Chin water when it instructed him to allocate that water "on an interim basis to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat 2698 (1984).

Nor have the Districts shown that Congress relinquished in "unmistakable terms" its own power to order the excess Ak-Chin water reallocated. Because we have concluded already that the Ak-Chin Settlement Act does not limit the Secretary's discretion, to conclude that the language of that Act surrenders Congress's own prerogative to order a reallocation would not be unmistakable, but unthinkable. But even if we were persuaded that the phrase "shall allocate" in the Ak-Chin Settlement Act somehow limited the Secretary's discretion to reallocate the excess Ak-Chin water, neither that phrase nor any other language in the Act purports to limit Congress's power to command a reallocation later. In fact, the terms of the Districts' subcontracts show that the parties anticipated legal changes and agreed to limit the government's liability for shortages, whatever their cause. In circumstances like these, we have held that water reclamation contracts are not immune to subsequent statutory modifications. *See O'Neill,* 50 F.3d at 686 (finding that Congress had not unmistakably waived its right to amend the amount of water it was obligated to deliver pursuant to water service contracts where "[t]he contract contemplates future

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[20]We note that Congress knows what language to use when it wants to give an allottee a property entitlement to CAP water. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. 102-575, tit. XXXVII, § 3704(a), 106 Stat. 4740 (1992) (directing the Secretary to "reallocate [CAP water] for the exclusive use of the Tribe"); *see* Act of Oct. 19, 1984, Pub.L. 98-530, § 2(f)(1), 2(k), 98 Stat. 2698 (directing the Secretary to reallocate a "permanent supply" of water for the "exclusive use" of the Ak-Chin Tribe).

changes in reclamation laws ... and ... limits the government's liability for shortages due to any causes").

In sum, the Districts have not demonstrated that the Ak-Chin Settlement Act automatically brought the excess Ak-Chin water allotment within the allocation of the non-Indian agricultural pool. The language of the Ak-Chin Settlement Act as well as the CAP's purposes and structure rather point to the contrary conclusion. And even if the Districts somehow did acquire a provisional right to the excess Ak-Chin water allotment, they have not demonstrated that Congress intended for that right to be irrevocable. Congress did not foreclose the Secretary's discretion, and it did not relinquish its own legislative prerogative. For these reasons, we conclude that the Districts have demonstrated no protected property interest in the excess Ak-Chin water allocation. Because the Districts have not shown that they had any property right to the excess Ak-Chin allocation that the SCAT Act could have substantially impaired, our inquiry is complete. *See Barcellos and Wolfsen v. Westlands Water Dist.*, 899 F.2d 814, 821 (9th Cir.1990).

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment to Plaintiffs. Plaintiffs' motion for attorneys' fees on appeal is denied.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, a municipal corporation of the State of Arizona,
Plaintiff-Respondent,
vs.
BRUCE BABBITT, Secretary,
United States Department of Interior,
Defendant-Petitioner.

No. 97-80303
DC# CV 94-2188-SMM
Arizona (Phoenix)

Filed July 31, 1997

ORDER

Before HUG, Chief Judge, and LEAVY, Circuit Judge.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MARICOPA-STANFIELD IRRIGATION and DRAINAGE DISTRICT, et al.,

Plaintiffs,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR,

Defendant.

CIV 94-2188-PHX-SMM

MEMORANDUM OF DECISION AND ORDER

I. BACKGROUND

The Colorado River Basin was divided by the 1922 Colorado River Compact into Upper and Lower Basins that joined at Lee Ferry. Arizona is included in the Lower Basin and in the 1928 Boulder Canyon Project Act received 2.8 million acre-feet ("A.F.") of the Colorado River's normal flow of 7.5 million A.F. 43 U.S.C. §§ 617(c), 617(l) (a). In 1944, the United States contracted with Arizona to supply its 2.8 million A.F. allocation during normal years. Arizona's water entitlement and contract were later confirmed by the Supreme Court in *Arizona v. California,* 373 U.S. 546 (1963).

The Colorado River Basin Project Act of 1968, Pub. L. No.90-537, 43 U.S.C. §§ 1501-1556 ("Basin Project Act") , authorized the Bureau of Reclamation to construct the Central Arizona Project ("CAP"), a $4 billion multi-purpose development project, which enables the State of Arizona to divert and use its allocation of Colorado River water. The project was authorized by Congress for the purpose of furnishing water supplies for irrigation and municipal and

industrial uses to water deficient areas in Arizona and western New Mexico, and for other purposes. *Id.*

The State of Arizona created a single agency to contract with the United States to repay the reimbursable costs of the CAP. The Arizona Legislature enacted and the Governor approved Laws 1971, Ch. 50, A.R.S. §§ 48-3701 to 48-3718, authorizing Maricopa, Pinal, and Pima counties to petition to create the Central Arizona Water Conservation District ("CAWCD") with the power to levy assessments on all taxable property within its boundaries and to enter into contracts with the United States. The petition was approved, creating CAWCD, which encompasses Maricopa, Pinal, and Pima counties, exclusive of Indian lands within their boundaries.

On December 15, 1972, the United States entered into a combined water service and repayment contract with CAWCD entitled "Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Project" ("Master Repayment Contract") in which CAWCD agreed to repay $1.2 billion in costs for the construction of water delivery facilities. *Central Arizona Irr. & Drainage Dist. v. Lujan,* 764 F.Supp. 582, 585 (D. Ariz. 1991).

The Basin Project Act authorized the Secretary of the Interior ("Secretary") to allocate Arizona's CAP water supply among various water users within the State of Arizona. 43 U.S.C. § 152; *Lujan*, 764 F.Supp. at 589. On March 24, 1983, the Secretary, upon consultation and recommendations from Arizona's Department of Water Resources ("DWR"), apportioned Arizona's CAP water among three user classes: (1) 309,828 A.F. annually to twelve Indian Tribes; (2) 638,823 A.F. annually to municipal and industrial users ("M & I users"); and (3) the remainder to non-Indian agricultural users on an individual percentage basis. Notice of Final Water Allocations to Indians and Non-Indian Water Users and Related Decisions ("1983 Allocation Decision"), 48 Fed.Reg. 12446. During years

of water shortage, Indian users and M & I users would share a priority on project water supplies. *Id.* All allocations were confirmed in delivery contracts.

Plaintiffs Maricopa-Stanfield Irrigation District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation and Drainage District are irrigation and drainage districts and Arizona municipal corporations located in Maricopa and Pinal counties in Arizona and are users of CAP water. Plaintiffs were formed, pursuant to Title 48, Chapter 19 of the Arizona Revised Statutes, to distribute water to the lands within their respective services areas. In 1983, each Plaintiff entered into a subcontract with the United States Department of Interior Bureau of Reclamation and CAWCD, for the purchase of water from the CAP residual pool. *Lujan*, 764 F.Supp. at 585. Plaintiffs are collectively scheduled to receive forty-three percent of the CAP non-Indian agriculture supply. *Id.* Plaintiffs also assumed the obligation to pay back the costs of construction of facilities used to deliver their CAP water, with twenty percent paid up front. *Id.*

Not all Colorado River water used in Arizona is part of the CAP supply. This case is centered upon 50,000 A.F. of water derived from the Yuma-Mesa Division of the Gila Project which had rights prior to the creation of the CAP to 300,000 A.F. When the CAP was created, the Secretary was required to respect the rights of users on the Colorado River, such as the Yuma-Mesa Division, who had existing contract entitlements or Indian water rights in the river. P.L. 90-537, § 301(b). These pre-existing rights have priority over the rights of CAP water users. *Id.* Yet, because the Yuma-Mesa Division never used 50,000 A.F. of the 300,000 A.F. to which it was contractually entitled, the DWR counted those unused 50,000 A.F. as a firm part of the water supply dedicated to the CAP, and reflected them in the recommendations the DWR made to the Secretary to consider in the 1983 Allocation Decision.

The first in a series of disputes leading to the present case arose when the Secretary, after making CAP allocations and accompanying water delivery contracts, realized that more water was needed to fulfill the United States' commitments to the Ak-Chin Indian Community. Since the CAP allocations and contracts were already completed, the Secretary had to either find "new water" that had not been allocated already or obtain some of the previously contracted-for water from the Colorado river. The Secretary decided to utilize the 50,000 A.F. of unused Yuma-Mesa Division water to fulfill its water obligations to the Ak-Chin Indian tribe, apparently without realizing that the Secretary had factored the 50,000 A.F. of unused Yuma-Mesa Division water into the original CAP supply. Correspondence from James Watt, Secretary of the Interior to Representative Morris D. Udall (October 7, 1983) . In his recommendations to Congress, the Secretary operated under the belief that only the Yuma-Mesa Division would be directly affected by transferring the 50,000 A.F. *Id.*

Thus, a dispute arose over rights to the 50,000 A.F. of water from the Yuma-Mesa Division. Then-Arizona Governor Bruce Babbitt expressed his concern over the proposed Ak-Chin settlement:

> The new agreement is based on the mistaken understanding that currently unused Colorado River contractual entitlement [50,000 A.F. of unused Yuma-Mesa Division water] can be redirected to use on the Ak-Chin reservation without adversely affecting CAP water supplies.

Correspondence from Bruce Babbitt, Governor, State of Arizona to James Watt, Secretary of the Interior (November 1, 1983), Pls' Exh. 13. In addition, Wesley E. Steiner, head of the DWR, also pointed out the Secretary's erroneous assumptions regarding the Yuma-Mesa Division water:

> The rub is that the Yuma-Mesa Division has never used more than 250,000 acre feet per

> annum . . . . Since this "entitlement" has now existed for 37 years without having been exercised, we assumed in our CAP water supply studies that this acreage never would be developed . . . and, hence, was part of the supply available to the CAP. This 50,000 acre feet per annum then was relied upon in the allocation recommendations advanced to the Secretary as the firmest part of the supply available to M & I users and to the Indians in central Arizona.

Correspondence from Wesley E. Steiner, Director, Arizona Department of Water Resources to Buck O'Rielly (Sept. 12, 1984), Pls' Exh. 14. Arizona's primary concern was that if the 50,000 A.F. were permanently allocated to the Ak-Chin Indian Community the overall CAP supply would be reduced, depending on the total supply available to be allocated to CAP users. Non-Indian agricultural users, like the Plaintiffs, would be affected first since allocations to the Indian and M & I users must be met first and any reduction in overall CAP supply would immediately effect the amount of water in the residual pool contracted for by non-Indian agricultural users. Once the residual pool was completely exhausted, the M & I users and Indian users would be affected. With less of a residual pool available, the M & I users were concerned that their potential exposure to any shortage was heightened. Compounding the problem, the Yuma-Mesa Division disputed CAP's or the federal government's right to utilize the 50,000 A.F.

The dispute was ultimately resolved by compromise. The Yuma-Mesa Division was compensated for the loss of entitlement to the 50,000 A.F. Section 2(g) of the Ak-Chin Settlement Act, 98 Stat. 2700. The Secretary and State of Arizona agreed that the Yuma-Mesa Division's unused 50,000 A.F. could be used for the Ak-Chin Indian Community as long as the Secretary agreed to return all surplus water not needed to fulfill the obligations of the Secretary under the Act (33,000

A.F. in a normal year) to the general CAP pool. *Id.* at 2(k), 98 Stat. at 2701.

Therefore, under the Ak-Chin Settlement Act, as amended by P.L. 98-530, 98 Stat. 2698 *et seq.*, Congress directed the Secretary to deliver to the Ak-Chin Indian Community annually a permanent supply of not less than 75,000 A.F. of water. *Id.* at § 2(a), 98 Stat. at 2698. The Ak-Chin Indian Community is entitled to receive 85,000 A.F. when sufficient water is available. *Id.* at § 2(b), 98 Stat. at 2698 99. Congress specified the sources and the priorities of the water to be delivered to the Ak-Chin Indian Community. First, a permanent supply of 50,000 A.F. of water previously used by the Yuma-Mesa Division is to be annually delivered to the Ak-Chin Indian Community. *Id.* at § 2(f) (1), 98 Stat. at 2699. Second, the CAP water allocated to the Ak-Chin Indian Community by the Secretary in his 1983 Allocation Decision is to be delivered to the Ak-Chin Indian Community as is necessary to fulfill the water obligations described above. *Id.* at § 2(f)(2), 98 Stat. at 2699. The Secretary's CAP allocations provide 58,300 A.F. of water for irrigation annually to the Community. 48 Fed.Reg. at 12447. These two sources give the Ak-Chin Indian Community access to a potential 108,300 A.F. of water to satisfy the 75,000 or 85,000 A.F. of water required in the Ak-Chin Settlement Act. During wet years when there is a sufficient amount of CAP water, there will be an excess of either 33,000 or 23,000 A.F. of water that the Secretary must allocate to CAP.

The statutory provision–that water not required for delivery to the Ak-Chin be allocated to CAP was the result of Congressional debate and subsequent revision of the original version of the Ak-Chin Settlement Act. The House's H.R. 6206 originally gave the Secretary unlimited discretion to contract for the Ak-Chin excess water. However, when H.R. 6202 reached the Senate, Senator Goldwater, introduced an amendment to the bill to "reconfirm the fact that any of the surplus aggregate water which the Secretary of the Interior does not use in

fulfilling his obligation to the (Ak-Chin) Indians goes to the central Arizona project." Pls' Ex. 19, Congressional Record, Vol. 130, No. 122, S11837. Senator DeConcini agreed, stating that "[t]hese amendments in no way affect the water rights assigned to the Ak-Chin community . . . but instead will provide mechanisms to allow the State to recover a portion of the water that will be lost as a result of the new water settlement." *Id.* at 11837-38. Senator DeConcini also confirmed that the 50,000 A.F. of water being transferred to the tribe from the Yuma-Mesa Irrigation District had been factored into the State's allocations for CAP water. *Id.* Representative Udall stated that the second amendment "clarifies that the balance of the water not needed to fulfill the Secretary's specific delivery obligations to the Ak-Chin shall be allocated to the central Arizona project." Pls' Ex. 20, Congressional Record, Vol. 130, No. 129, H10880-81. Mr. Udall further stated that water from those sources in excess of the community's settlement "shall be allocated by the Secretary to the CAP." *Id.* Lastly, then-Congressman McCain stated as follows:

> As passed by the Senate, H.R. 6206 contains amendments by Senators Goldwater and DeConcini that address concerns expressed by the State and other water users. I believe these amendments should be agreed to by the House. In short, the Senate amendments limit the amount of irrigated acreage in the Yuma-Mesa irrigation district, ensure that any water surplus to the Ak-Chin's settlement would be available only to the central Arizona water conservation district for CAP purposes, and establish a trust fund to buy water from agricultural users along the Colorado River to guarantee the Ak-Chin supply in dry years.

Id.

The Ak-Chin Settlement, states, in pertinent part:

> The water referred to in subsection (f)(1) shall be for the exclusive use and benefit of the Ak-Chin Indian Community, except that whenever the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water, referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act.

Pub. L. 98-530, 98 Stat. at 2701, ¶ 2(k). Thus, Congress settled the dispute over rights to the 50,000 A.F. of Yuma-Mesa Division water.

Yet, the excess water from the Ak-Chin Settlement Act came into dispute once again when Congress considered it as a possible source to settle water claims made by the Fort McDowell Indian Community. Congress, however, rejected the use of the Ak-Chin excess water to satisfy the federal government's obligations to the Fort McDowell Indian Community:

> The Committee notes that the so-called "Ak-Chin surplus" water is not included in the substitute as a potential source of water for the Fort McDowell settlement in section 6 of H.R. 5063 as introduced. This source was removed in response to the testimony of numerous witnesses, including those from the Administration, Arizona's Department of Water Resources, the CAWCD, and municipal and agricultural entities in Maricopa and Pinal counties that Ak-Chin water would not be appropriate or acceptable for use in the Fort McDowell settlement.

H.R. Rep. No. 778, 101st Cong., 2d Sess. 23 (1990).

Finally, the dispute giving rise to the case arose when Congress permanently reallocated the Ak-Chin surplus water to the San Carlos Apache Tribe. San Carlos Apache Tribe Water Rights Settlement Act of 1992 ("SCAT Act"), Title XXXVII of Pub. L. 101-575, § 3701 *et seq.*, 106 Stat. 4740 *et seq.* Again, the same parties opposed use of the Ak-Chin excess water. In an apparent response to the opposition, Congress waived sovereign immunity and authorized an action by parties who were damaged by its reallocation of the surplus water. *See id.* at § 3708(f)(1).

The parties in this action cite to essentially the same facts, but dispute the legal meaning of them. Plaintiffs claim that in enacting the SCAT Act, Congress took the Plaintiffs' rights to receive the surplus Ak-Chin Settlement water without compensation, violating the Fifth Amendment Takings Clause. Plaintiffs assert that if the Ak-Chin excess water was part of the general CAP supply, it was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users, and could not be taken for use in the San Carlos Apache Tribe settlement without payment of just compensation. Defendant claims that the Plaintiffs had no protectable property rights in the surplus water, and that even if they did, they cannot prove damages without resorting to speculation.

Pending before the Court are Defendant's Motion for Summary Judgment and Plaintiffs' Partial Motion for Summary Judgment. The motions are fully briefed and the Court heard oral argument on July 22, 1996.

II. STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1995); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986);

Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also Jesinger*, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The dispute must also be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see also Jesinger*, 24 F.3d at 1130.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 32-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322; *see also Citadel Holding Corp. v. Roven, 26* F.3d 960, 964 (9th Cir. 1994) . The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex*, 477 U.S. at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-88 (1986); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

III. DISCUSSION

A. Jurisdiction

As a jurisdictional basis for this action, Plaintiffs rely upon the grant of jurisdiction contained in Section 3708(f) of the SCAT Act, Pub. L. 102-575, § 3701 *et seq*. Section 3708(f) of the SCAT Act provides as follows:

> (f) Claims. (1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide

> any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water . . . .
>
> (2) For- purposes of this subsection, "claim" means a claim that the reallocation of the water to the [San Carlos Apache Indian] Tribe pursuant to section 3704 (a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water.

Pub. L. 102-575, § 3708(f).

Section 3704 (a) of the SCAT Act states, in relevant part, that:

> (a) Reallocation of water - the Secretary shall reallocate, for the exclusive use of the Tribe, all the water referred to in subsection (f)(2) of Section 2 of the Act of October 19, 1984 (98 Stat. 2698), which is not required for delivery to the Ak-Chin Indian Reservation under that Act.

Section (f)(2) of Section 2 of the Act of October 19, 1984 (98 Stat. 2698), Pub. L. 98-530, relates to the following water:

> (2) Such Central Arizona Project water allocated to the Community and referred to in the "Notice of Final Water Allocations to Indian and non-Indian Water Users and Related Decisions" (48 Fed. Reg. 12446, March 24, 1983) as is necessary to fulfill the Secretary's water delivery obligations.

Defendant argues that Plaintiffs premise jurisdiction upon a statute that permits suit against the United States only if Plaintiffs' claim can establish the unlawful deprivation of their legal rights to any or all of the 58,300 A.F. of water allocated to the Ak-Chin Tribe in the Secretary's 1983 Allocation Decision. This technical argument attempts to create a legal fiction in order to bar Plaintiffs from bringing this suit. Defendant bases his argument on the Ak-Chin Act's characterization of excess

Ak-Chin water as deriving from the Ak-Chin's 1983 allotment of 58,300 A.F. Of course, Plaintiffs do not argue that they have a right to the Ak-Chin's CAP allotment. Rather, Plaintiffs argue that they have a right to the excess water not needed for delivery to the Ak-Chin pursuant to the Ak-Chin Settlement Act. Nowhere in the authorization to bring suit contained in the SCAT Act does Congress state that suits brought must pertain to the Ak-Chin's 58,300 A.F. CAP allotment. The provenance of the excess water referred to in the SCAT Act's authorization to bring suit is inconsequential to the waiver of sovereign immunity since the statute clearly states that suits may be brought that pertain to the permanent allocation of the Ak-Chin excess water to the San Carlo Apache Tribe. Plaintiffs allege precisely the type of claim that was contemplated by the waiver of sovereign immunity -- that the allocation of the Ak-Chin excess water reduced the residual CAP pool and, hence, harmed the Plaintiffs.

Furthermore, Plaintiffs are one of the parties permitted to bring suit under the waiver contained in the SCAT Act. P.L. 102-575, § 3708(f). Pursuant to the Secretary's 1983 Allocation Decision, Plaintiffs entered into subcontracts with the Bureau of Reclamation of the United States Department of Interior and CAWCD for the purchase of water from the CAP. Plaintiffs are "other contractors of CAP water." *Id.* Plaintiffs assert legal rights and/or a protectable property interest in the excess water derived from the Ak-Chin Settlement Act and, as such, their claim is properly brought pursuant to the Congressional authorization contained in the SCAT Act. Pub. L. 102-575, § 708(f).

Mindful of the jurisprudential principle that "no action is against the United States unless the legislature has authorized it," the Court finds that this suit is authorized under the jurisdictional grant; contained in the SCAT Act. *See Dalchite v. United States,* 346 U.S. 15, 10 (1952); *Feres* v. *United States,* 340 U.S. 135, 139 (1950).

B. Analysis

Though voluminous documents containing statutes and historical background information were submitted with the parties' cross-motions for summary judgment, the determinative issue before the Court is what Congress intended with respect to the excess water compromise contained in the Ak-Chin Settlement Act. P.L. 98-530, § 2(f), 98 Stat. at 2701. Specifically, the Court must determine whether the Ak-Chin Settlement Act allocated the excess water to the general CAP supply or whether the Secretary retained discretion to allocate the excess water at-will. If the Secretary retained discretion over the Ak-Chin excess then, as Defendant argues, Plaintiff cannot show the existence of a property right in the Ak-Chin surplus water essential to establishing a Fifth Amendment takings claim. If, as Plaintiffs argue, the Ak-Chin surplus water was statutorily allocated to the general CAP supply then the water was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users. Hence, the water could not be taken for use in the San Carlos Apache Tribe settlement without payment. Thus, the issue before the Court is whether Congress dedicated the Ak-Chin excess water to the general CAP supply, or whether it gave the water to the Secretary to allocate at will.

1. Deference to Administering Agency's Interpretation

As a preliminary matter, the Court must address the issues alluded to by the Defendant implicating *Chevron USA, Inc. v. NRDC,* 104 S. Ct. 2778 (1984). In *Chevron* the Supreme Court held that where a legislative delegation to an agency on a particular question is implicit rather than explicit, a court may not substitute its own construction of the statutory provision for a reasonable interpretation made by the administrator of the agency. *Id.* at 2782. In this case, the Defendant, Secretary of the Interior, argues that as the administering agent, the Court should grant deference to his interpretation of the Ak-Chin

Settlement Act and the discretionary authority it grants to the Secretary. Yet, the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Id.* Therefore, because the Court finds that the congressional intent of the Ak-Chin Settlement Act is clear, as explained more fully below, the Court need not defer to the Secretary's interpretation. *See id.*

2. Secretary's Discretion over Ak-Chin Excess Water

The Ak-Chin Settlement Act directly speaks to the issue of the Secretary's authority over the Ak-Chin excess water. The Ak-Chin Settlement Act states, "the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water, referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act." Pub. L. 98-530, 98 Stat. at 270, § 2(k). As Justice Scalia stated in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J. concurring):

> The meaning of terms on the statute books ought to be determined not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it); and (2) most compatible with the surrounding body of law into which the provision must be integrated -- a compatibility which, by a benign fiction, we assume Congress always has in mind.

Accordingly, the Court will first interpret the plain meaning of the statute. Then, as this statute does not exist in a vacuum, the

Court will analyze the statute in the context of the surrounding body of law and congressional debate.

The Defendant urges the Court to interpret the statute to mean that Congress, in requiring the Secretary to allocate the excess water to the CAP, gave the Secretary unlimited discretion over the water. The Defendant bases its argument on the fact that the Ak-Chin Act refers to CAP as established by Public Law 90-537, Section 1521 (Colorado River Basin Act, 43 U.S.C. § 1524). *See* P.L. 98-530, § 2(c), 98 Stat. at 2699. In the Colorado River Basin Act, the Secretary of the Interior is given broad discretion in the allocation of the CAP water. *See Lujan*, 764 F.Supp. at 589 (quoting 43 U.S.C. § 1521). Therefore, the Defendant argues that the Secretary retained discretion to allocate the water to any CAP user, including the San Carlos Apache Tribe.

Though the Secretary does have broad discretion to allocate CAP water, Congress may circumscribe that authority. *See id.* In the Ak-Chin Settlement Act, the "shall allocate" language clearly limits the Secretary's authority. Further, the fact that the Secretary must allocate the water to the CAP necessarily implies that there are others outside the CAP that the Secretary may have contracted the water to but, owing to this provision, cannot. Therefore, what is encompassed in the meaning of CAP is critical to evaluating the extent of the Secretary's discretion over the excess water. The crux of the Defendant's argument is that the San Carlos Apache Community, a CAP user, falls within the meaning of the Ak-Chin Settlement Act's reference to CAP and, thus, the Secretary had the authority to permanently allocate the excess water to them.

Therefore, in order to determine whether allocation of the Ak-Chin excess water to the San Carlos Apache Community is within the realm of "CAP" as referred to in the Ak-Chin Settlement Act, the Court must briefly review the structure of CAP allocations and other water rights in Arizona. In Arizona,

water is divided among various priorities of rights. Ranking on the top are rights pre-existing the CAP, such as those held by the Mesa-Yuma Division. P.L. 90-537, § 301(b). The 50,000 A.F. acquired from the Mesa-Yuma Division retained that priority and was meant to provide a firmer base water supply than even the Ak-Chin's CAP allocation could provide. P.L. 98-530, § 2(f)(1), 98 Stat. at 2699. CAP allocations are next on the priority list, but priorities are further divided among CAP user groups. Indian users top the CAP priority list, followed by M & I users and finally non-Indian agricultural users. *See* 48 Fed.Reg. 12446. As is evident from this structure, not all water is CAP water. Also, a CAP user can receive CAP water allocations and contract for water outside the CAP. A CAP user can even contract for CAP water from another CAP user outside the context of the CAP, as is evidenced by the San Carlos Apache Community's sale of the excess water it received from the SCAT Act to M & I users. Nonetheless, within the context of CAP each of the allottees receives the amount that was allotted to them pursuant to the 1983 Allocation Decision and subsequent delivery contracts.

Following the 1983 CAP allocations, the Secretary divided all of the CAP water among the users and entered into delivery contracts. These contracts further circumscribe the Secretary's authority to allocate CAP water. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993) (stating that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment). Yet, the Defendant now alleges that any water falling into the residual pool allocated to non-Indian agricultural users may be raided at-will simply because the Secretary has discretion over CAP allocations. This argument does not comport with the Secretary's 1983 Allocation Decision which created a residual pool for non-Indian agriculture. *See* 48 Fed.Reg. 12446. The residual pool is made up of water not required for delivery pursuant to the allotment contracts of the

other CAP users of higher priority. *Id.* Thus, non-Indian agricultural users, such as the Plaintiff, are entitled to all CAP supply water not delivered pursuant to Indian and M & I users allotment contracts.

The Secretary cannot diminish the residual pool simply because the pool bears the risk of natural shortages. Nor does the fact that the Plaintiffs contracted for percentages of water rather than fixed amounts mean that the Plaintiffs have only a unilateral expectation of receiving any of the CAP general pool. To the contrary, non-Indian agricultural users, such as the Plaintiffs, are contractually entitled to all the CAP water not contracted for by other users. *See* 48 Fed.Reg. 12446. If the Secretary had wanted to arrange the CAP so that he could contract for excess water even after contracting with Plaintiffs, he could have done so. Yet, he would have had to do that prior to entering into contracts with the CAP users that essentially contracted for all the CAP water. Defendant is unable to cite to any authority that gives the Secretary the authority to re-allocate water that has already been allocated and committed by contract. As the Ninth Circuit stated, "too liberal an interpretation of the residual sovereign power of the government to override its contractual commitments would eviscerate the government's power to bind itself to contracts." *Madera*, 985 F.2d at 1401.

Once Plaintiffs entered into water contracts with the United States, the Secretary lost any authority to allocate the contracted-for water. Plaintiffs originally entered into their agricultural water contracts on November 21, 1983, wherein they are collectively scheduled to receive forty-three percent of the CAP non-Indian agricultural water supply. *Lujan*, 764 F. Supp. at 585. Those subcontracts were entered into after the Secretary's 1983 Allocation Decision. Pursuant to these contracts, the Plaintiffs must reimburse the federal government for the cost of their water delivery systems with interest. *Id.* Plaintiffs generate this revenue through the purchase and use of

CAP water. *Id.* Yet, the costs of repayment remain fixed regardless of the amount of water they receive. *Id.* If the Secretary could invade the residual pool at will, the Plaintiffs would receive only the residual pool of the residual pool--a precarious position in light of the contractual burdens of repayment. In the arrangement suggested by the Secretary, the Plaintiffs are a steady source of repayment while the Secretary is still free to strike a better bargain for the CAP residual pool.

The suggested arrangement is not supported by the water delivery contracts themselves which state, "the United States shall use all reasonable diligence to make available to the Subcontractor [Plaintiffs] the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4." This is not negated by the Master Repayment Contract, section 8.12, which states that the government is not liable if there is a shortage of water available to CAP as a whole. The Plaintiffs bore the risk of water shortages and indeed the whole allocation system was geared to place such a risk upon them. The Plaintiff, however, did not bear the risk that the Secretary would remove water from the general CAP pool to satisfy one if its independent obligations.

The allocation of the excess Ak-Chin water to the San Carlos Apache Community does not fit within the allocation structure and contracts for CAP water. Allocation of the excess water to the San Carlos Apache Community increases their CAP water supply above that which was allocated to them in the Secretary's 1983 Allocation Decision. Such an increase in a CAP allocation to one user necessarily deprives the general CAP pool of water upon which it previously relied. The Ak-Chin Settlement Act's requirement that the Secretary allocate the excess water to the CAP could not mean that the Secretary may allocate the water to any CAP user but, instead, that he may allocate the water to the CAP general pool, according to the previously established allocations and delivery contracts.

In response, Defendants argue that the excess water comes from the Ak-Chin's CAP allocation of 58,300 A.F. that Plaintiffs knew of at the time they executed their subcontracts. According to this argument, since the Plaintiffs knew that this water was allocated to an Indian user, they should have known that the water could be reallocated to another Indian user. To support this proposition the Defendant cites a portion of the 1983 Allocation Decision which states that, "[a]ll water not contracted for, or contracted for but not expected to be utilized during interim periods, will be retained under jurisdiction of the Secretary." 48 Fed.Reg. 12446, 12447. This grant of authority, however, was circumscribed by the clear language of the Ak-Chin Settlement Act which required the Secretary to allocate the excess Ak-Chin water to the CAP general supply. P.L. 98-530, § 2(f), 98 Stat. at 2701.

Congress is presumed to have known the basic rules of statutory construction when enacting legislation. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495-97 (1991). If Congress had wanted to grant the Secretary the authority to allocate the water outside of the CAP or utilize the water to increase the allocation of another Indian user, it could have done so. Yet, the clear language of the Ak-Chin Settlement Act grants the excess water to the CAP supply. P.L. 98-530, § 2(f), 98 Stat. at 2701.

Furthermore, though the Plaintiffs knew that the Ak-Chin Indian Community were allotted 58,300 A.F. of CAP water, the Plaintiffs had no idea that the 50,000 A.F. from the Mesa-Yuma Division, counted on when making CAP allocations, would be permanently allocated to the Ak-Chin Indian Community. At least in terms of the Ak-Chin Settlement Act, the Plaintiffs received some benefit. Under the Ak-Chin Settlement Act, the CAP's disputed rights to 50,000 A.F. were converted into settled rights to 33,300 A.F. in a normal year. In the SCAT Act, the Plaintiffs received nothing for the removal

of water from the general CAP pool, except the ability to bring this suit.

The Defendant next argues that if the Court finds that the Defendant must compensate the Plaintiffs for the removal of the Ak-Chin excess water from the general CAP pool, the government is being forced to pay for the same water twice. Defendant argues that in the Ak-Chin Settlement Act the government bought the development rights to the 50,000 A.F. of water from the Yuma-Mesa Division. Further, the Defendant asserts, since the government bought the water, no rights could accrue to other CAP users. Yet, the government previously committed the 50,000 A.F. to the CAP and, then when the dispute arose during the Ak-Chin Settlement, it decided to purchase the water rights to avoid present and future conflict. Also as part of the resolution at disputed rights, the government committed excess water from the Ak-Chin's 1983 CAP allocation of 58,300 A.F. not needed for use by the Ak-Chin back to the CAP general pool to replace the loss of the 50,000 A.F. from the Yuma-Mesa Division. The 50,000 A.F. the government paid for was committed to the Ak-Chin settlement and is not a part of the Ak-Chin excess water now in dispute. Accordingly, Congress is not paying for the same water twice.

It is well-accepted that courts should not rely on statutory history as a basis for refusing to give effect to the plain language of a statute; however, courts may rely on statutory history to solve ambiguity. *See Hubbard v. United States,* 115 S. Ct. 1754, 1761 (1995); *Arizona Elec. Power Co-op, Inc. v. United States,* 816 F.2d 1366, 1375 (9th Cir. 1987). Though the meaning of the Ak-Chin Settlement Act is clear, the statutory history further reveals Congress' intention when crafting the Ak-Chin Settlement Act. Congress appeased opponents who feared that the CAP supply would be reduced by the settlement by returning water not needed for delivery to the Ak-Chin to the CAP supply.

In the years after the Ak-Chin Settlement Act, Congress was forced to find sources of water to fulfill the claims of other tribes. Confusion over rights to Colorado River water, both CAP supply water and other water, led to a heated debate over the status of the Ak-Chin excess water. Finally, Congress used the Ak-Chin excess water to settle the claims of the San Carlos Apache Tribe. Yet, Congress recognized that removing the Ak-Chin excess water from the CAP supply would harm some CAP contractors and waived sovereign immunity over such claims. *See* SCAT Act, Pub. L. 102-575, § 3708(f).

Absent the SCAT Act, the Plaintiffs would have received the surplus water and are the first CAP users effected by its removal from the CAP supply. Plaintiffs have never argued that the Ak-Chin excess water was to be allocated to them directly. What they have argued is that the water taken from the CAP for the Ak-Chin settlement was to be returned to the general CAP pool to the extent that it was not needed for use by the Ak-Chin. The fact that the excess water is composed of the Ak-Chin's 1983 allocation does not make a difference to the general CAP pool's entitlement to the water. The settlement was arranged this way for the purpose of ensuring a supply of 50,000 A.F. to the Ak-Chin Community that had a priority over the CAP. Yet, for the Ak-Chin to receive this priority water, they gave the excess of their 1983 CAP allotment back to the general CAP pool. Once in the CAP, the water had to follow the Secretary's 1983 Allocation Decision and contract commitments. Non-Indian agricultural users, such as Plaintiffs, contracted for the residual pool of water not allocated to and contracted for by other CAP users. The SCAT Act reduced the amount of water available to the CAP and, due to the structure of CAP, the non-Indian agricultural users will be the first to suffer from this reduction.

The Defendant has repeatedly attempted to shift the focus from the clear directive contained in the Ak-Chin Settlement Act that the excess water be returned to the CAP, to

the status of the water prior to this provision; i.e, it was an Indian allocation or it was priority Yuma-Mesa Division water. Regardless of what the water was, the Ak-Chin Settlement Act placed the excess water into the general CAP pool which had already been contracted for. Therefore, had the Ak-Chin excess water not been permanently allocated to the San Carlos Apache Community, the Plaintiffs certainly would have received the surplus water in normal years.

In the Ak-Chin Settlement Act, Congress limited the Secretary's authority to the excess Ak-Chin water by providing that he may allocate it only to the CAP. Pub. L. 98-530, § 2(f), 98 Stat. at 2701. Yet, Congress later directed the Secretary to permanently allocate the excess Ak-Chin water to the San Carlos Apache Community. Pub. L. 102-575, § 3701. This permanent allocation is outside of the San Carlos Apache's CAP allocation and the CAP structure. As such, the allocation contradicts the Ak-Chin Settlement Act's requirement that the Ak-Chin excess water be allocated to the general CAP supply.

Though the Secretary has broad discretion over CAP water, that authority may be circumscribed by contractual obligations and clear congressional intent. *See Lujan*, 764 F.Supp. at 589. The Secretary's actions may be reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The reviewing court shall hold any acts that are not in accordance with the law to be unlawful and set aside the action. *Lujan*, 764 F.Supp. at 589. Plaintiffs are not seeking to set aside the agency action. Instead, since Congress directed the Secretary to allocate the Ak-Chin excess water to the San Carlos Apache Community, Plaintiffs are seeking compensation for the loss of the water under the Fifth Amendment Takings Clause.

3. Protectable Property Interest

The Court must next determine whether the Plaintiffs have a compensable property interest in the Ak-Chin excess water protected by the Fifth Amendment. U.S. Const. Amend. V; *see Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573,

1580 (Fed. Cir. 1993) (taking compensable under Fifth Amendment inherently requires existence of private property interest). Generally, "[r]ights against the United States arising out of a contract with it are property protected by the Fifth Amendment." *Lynch v. United States,* 292 U.S. 571, 579 (1934). However, to establish a property interest, Plaintiffs must demonstrate a legitimate claim of entitlement. *See City of Santa Clara v. Pacific Gas & Electric Co.,* 572 F.2d 660, 676 (9th Cir.) (citing *Board of Regents v. Roth,* 408 U.S. 564 (1972)). Plaintiffs must have more than a unilateral expectation of a benefit. *See id.*; *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980) ("mere unilateral expectation or an abstract need is not a property interest entitled to protection"). Yet, water rights, the type of which are at issue here, have been specifically recognized as property protected by the Fifth Amendment. *See Fort Mohave Indian Tribe v. United States,* 23 Cl.CT. 417 (1991).

Defendants contend that the same issues presented in this case have already been resolved in district court in a suit brought by these same Plaintiffs. *See Central Arizona Irr. & Drainage Dist. v. Lujan,* 764 F.Supp. 582 (D. Ariz. 1991). In *Lujan* the District Court upheld amendments to the Secretary's Master Repayment Contract with CAWCD that allowed M & I users to use part of their allotments for groundwater recharge. *Id.* at 588. The Plaintiffs challenged the use of CAP water for recharging on the basis that it is contrary to state law and deprived them of water that the M & I users could not put to direct use and would otherwise become part of the residual pool. *Id.* The *Lujan* court held that CAP allocations and preferences are the exclusive provenance of the Secretary and Plaintiffs had only a unilateral expectation of receiving the water. *Id.* Plaintiffs had only an expectation to receive water that was not "used" by the M & I users and the Secretary's determination made it possible for M & I users to "use" their entire allocation. *See id.* at 589.

Defendant now argues that the district court has already held that Plaintiffs have only a unilateral expectation of receiving *any* water. This in not what the *Lujan* court held. *Lujan* specifically holds that the Secretary has the discretion to determine priorities and uses of CAP water. *Id.* at 590. Yet, Congress may limit the Secretary's discretion as it did in the Ak-Chin Settlement Act and the SCAT Act. *See id.*

Plaintiffs had a contractual right to receive the residual pool of CAP water. Plaintiffs acknowledge that the Districts' pool "existed only at the mercy of the prior demands of the Indians and M & I users." Pls' Response, p. 13. However, these demands are limited to the amount allocated to them in the Secretary's 1983 Allocation Decision and confirmed in contracts. Removing water specifically allotted to the CAP general supply to settle claims of one user is tantamount to increasing that user's allotment with water already contracted for by another user. Since all CAP water was contracted for, none of the CAP pool was available to settle water claims.

Congress certainly has the power of eminent domain that it may exercise to appropriate the Ak-Chin excess water and utilize it in the San Carlos Apache Settlement. U.S. Const. Amend V; *see AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. Partnership,* 6 F.3d 867 (2nd Cir. 1993) (exercise of eminent domain power will generally be upheld when it is rationally related to conceivable public purpose). When Congress removed the Ak-Chin excess water from the general CAP pool it removed water that the Plaintiffs had contractual rights to receive. Certainly, not all economic rights are compensable property rights. *See Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). Only those rights which are backed by law, generate a compensable Fifth Amendment taking. *See id.* In this case, Congress specifically allocated the Ak-Chin excess water to the CAP supply, for which the Plaintiffs had contractual rights to receive a portion of the residual pool.

The Fifth Amendment protects private property interests consisting of recognized expectations and mutual understandings from being taken for public use. *See Skip Kirchdorfer,* 6 F.3d at 1580-81. By removing the Ak-Chin excess water from the CAP supply in the SCAT Act, Congress violated its previous commitment of the water to the CAP supply and, therefore, its commitment to the 1983 Allocation Decision and delivery contracts. Since Plaintiffs had contractual rights to the Ak-Chin excess water as a part of the CAP supply, they are entitled to compensation. *See Lynch*, 292 U.S. at 579.

4. Damages

Defendant also argues that Plaintiffs cannot prove their damages without resorting to speculation. Yet, after receiving its settlement, the San Carlos Apache Community leased portions of their water (which includes the Ak-Chin excess water) to the cities of Chandler, Glendale, Goodyear, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and the Town of Gilbert for $1,200 per A.F., not including CAP capital or operation and maintenance costs. The San Carlos Apache are not the only Indian tribe to lease their water. Likewise, the Ak-Chin lease a portion of the water received in the Ak-Chin Settlement Act to the Del Webb Corporation. P1's Exh. 31. Even the Department of Interior has purchased CAP contract water from the Harguahala Valley Irrigation District to help resolve the claims of the Fort McDowell Indian Community.

These transactions confirm that the water rights in question, like any other property right, are valuable and may be bought and sold in the marketplace. As such, the value of these water rights may be proven without resorting to speculation.

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment, filed December 15, 1995 (Doc. #20), is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Partial Motion for Summary Judgment, filed December 15, 1995 (Doc. #23), is GRANTED.

IT IS FURTHER ORDERED setting a status hearing for March 10, 1997 at 2:30 p.m. to discuss the issue of damages.

DATED this 20th day of February, 1997.

Stephen M. McNamee
United States District Judge

Copies to all counsel of record

APPENDIX D

BOULDER CANYON PROJECT ACT, 43 U.S.C. §§ 617 *et seq.*

§ 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter and the payments to the United States under subsection (b) of section 617c of this title. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to subsection (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

APPENDIX E

COLORADO RIVER BASIN PROJECT ACT, 43 U.S.C. §§ 1501 *et seq.*

§ 1501. Congressional declaration of purpose and policy

(a) It is the object of this chapter to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.

(b) It is the policy of the Congress that the Secretary of the Interior (hereinafter referred to as the "Secretary") shall continue to develop, after consultation with affected States and appropriate Federal agencies, a regional water plan, consistent with the provisions of this chapter and with future authorizations, to serve as the framework under which projects in the Colorado River Basin may be coordinated and constructed with proper timing to the end that an adequate supply of water may be made available for such projects, whether heretofore, herein, or hereafter authorized.

§ 1521. Central Arizona Project

(a) Construction and operation; Granite Reef aqueduct and pumping plants; Orme Dam and Reservoir; Buttes Dam and Reservoir; Hooker Dam and Reservoir; Charleston Dam and Reservoir; Tucson aqueducts and pumping plants; Salt-Gila aqueducts; related and appurtenant works

For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary shall construct, operate, and maintain the Central Arizona Project, consisting of the following principal works: (1) a system of main conduits and canals, including a main canal and pumping plants (Granite Reef aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to Orme Dam or suitable alternative, which system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible: *Provided*, That any capacity in the Granite Reef aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3,700 feet above mean sea level or when releases are made pursuant to the proviso in section 1552(a)(3) of this title: *Provided further*, That the costs of providing any capacity in excess of 2,500 cubic feet per second shall be repaid by those funds available to Arizona pursuant to the provision of section 1543(f) of this title, or by funds from sources other than the development fund: (2) Orme Dam and Reservoir and power-pumping plant or suitable alternative; (3) Buttes Dam and Reservoir, which shall be so operated as not to prejudice the

rights of any user in and to the waters of the Gila River as those rights are set forth in the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in United States against Gila Valley Irrigation District and others (Globe Equity Numbered 59); (4) Hooker Dam and Reservoir or suitable alternative, which shall be constructed in such a manner as to give effect to the provisions of subsection (f) of section 1524 of this title; (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Salt-Gila aqueducts; (8) related canals, regulating facilities, hydroelectric powerplants, and electrical transmission facilities required for the operation of said principal works; (9) related water distribution and drainage works; and (10) appurtenant works.

(b) Limitation on water diversions in years of insufficient mainstream Colorado River water

Article II(B)(3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona,

Nevada, and California which are senior to diversions of the Central Arizona Project, or amend any provisions of said decree.

* * *

§ 1524. Water furnished from Central Arizona Project

* * *

(b) Contracts with municipal and industrial users

(1) Irrigation and municipal and industrial water supply under the Central Arizona Project within the State of Arizona may, in the event the Secretary determines that it is necessary to effect repayment, be pursuant to master contracts with organizations which have power to levy assessments against all taxable real property within their boundaries. The terms and conditions of contracts or other arrangements whereby each such organization makes water from the Central Arizona Project available to users within its boundaries shall be subject to he Secretary's approval, and the United States shall, if the Secretary determines such action is desirable to facilitate carrying out the provisions of this chapter, have the right to require that it be a party to such contracts or that contracts subsidiary to the master contracts be entered into between the United States and any user. The provisions of this clause (1) shall not apply to the supplying of water to an Indian tribe for use within the boundaries of an Indian reservation.

(2) Any obligation assumed pursuant to section 485h(d) of this title with respect to any project contract unit or irrigation block shall be repaid over a basic period of not more than fifty years; any water service provided pursuant to section 485h(e) of this title may be on the basis of delivery of water for a period of fifty years and for the delivery of such water at an identical price per acre-foot for water of the same class at the several points of delivery from the main canals and conduits and from such other points of delivery as the Secretary may designate; and long-term

contracts relating to irrigation water supply shall provide that water made available thereunder may be made available by the Secretary for municipal or industrial purposes if and to the extent that such water is not required by the contractor for irrigation purposes.

(3) Contracts relating to municipal and industrial water supply under the Central Arizona Project may be made without regard to the limitations of the last sentence of section 485h(c) of this title; may provide for the delivery of such water at an identical price per acre-foot for water of the same class at the several points of delivery from the main canals and conduits; and may provide for repayment over a period of fifty years if made pursuant to clause (1) of said section and for the delivery of water over a period of fifty years if made pursuant to clause (2) thereof.

* * *

APPENDIX F

Public Law 98-530
98th Congress

An Act
Relating to the water rights of
the Ak-Chin Indian Community.

* * *

SEC. 2. (a) As soon as possible but not later than January 1, 1988, the Secretary shall deliver annually a permanent water supply from the main project works of the Central Arizona Project to the southeast corner of the Ak-Chin Indian Reservation of not less than seventy-five thousand acre-feet of surface water suitable for agricultural use except as otherwise provided under subsections (b) and (c).

(b) In any year in which sufficient surface water is available, the Secretary shall deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet. The Secretary shall be required to carry out the obligation referred to in this subsection only if he determines that there is sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity.

(c) In time of shortage, if the aggregate supply of water referred to in subsection (f) is not sufficient to deliver seventy-five thousand acre-feet, the Secretary may deliver a lesser quantity but in no event less than seventy-two thousand acre-feet. For the purposes of this Act, the term "time of shortage" means a calendar year for which the Secretary determines that a shortage exists pursuant to section 301(b) of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537), such that there is not sufficient Central Arizona Project water in that year to supply up to a limit of three hundred nine thousand eight hundred and twenty-eight acre-feet of water for

Indian uses, and up to a limit of five hundred ten thousand acre-feet of water for non-Indian municipal and industrial uses.

* * *

(f) The water supply referred to in subsections (a) and (c) shall consist of the aggregate of the following --

(1) First, a permanent supply of no more or less than fifty thousand acre-feet of surface water per annum to be diverted from the Colorado River of the three hundred thousand acre-feet of water heretofore authorized by the Act of July 30, 1947 (61 Stat. 628), for beneficial consumptive use on lands of the Yuma Mesa Division of the Gila Project. Water referred to in this paragraph and in subsection (g)(1) shall have equal priority. Furthermore, these provisions shall not affect the relative priorities among themselves of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project as fully set out in section 301(b) of Public Law 90-537.

(2) Such Central Arizona Project water allocated to the Community and referred to in the "Notice of Final Water Allocations to Indians and non-Indian Water Users and Related Decisions" (48 Fed. Reg. 12446, March 24, 1983) as is necessary to fulfill the Secretary's water delivery obligations. Delivery of such Central Arizona Project water shall be as provided in the December 11, 1980, Central Arizona Project water delivery contract between the United States and the Ak-Chin Indian Community, except as otherwise provided by this Act and any contract executed pursuant to this Act.

Notwithstanding any other provision of this Act, nothing in paragraph (1) of this subsection shall enlarge or diminish the authority of the Secretary under existing law. Nothing in section 4 or any other provision of this Act shall reduce the Secretary's obligation to deliver to the Ak-Chin Reservation a

permanent supply of fifty thousand acre-feet of surface water per annum as well as the water referred to in paragraph (2) of this subsection.

* * *

(k) The water referred to in subsection (f)(1) shall be for the exclusive use and benefit of the Ak-Chin Indian Community, except that whenever the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act.

APPENDIX G

TITLE XXXVII--SAN CARLOS APACHE TRIBE WATER RIGHTS SETTLEMENT, ARIZONA

SEC. 3704. WATER.

(a) REALLOCATION OF WATER.--The Secretary shall reallocate for the exclusive use of the Tribe, all of the water referred to in subsection (f)(2) of section 2 of the Act of October 19, 1984 (98 Stat. 2698), which is not required for delivery to the Ak-Chin Indian Reservation under that Act. The Secretary shall exclude, for the purposes of determining the allocation and repayment of costs of the CAP as provided in Article 9.3 of Contract No. 14-0906-09W-09245, Amendment No. 1, between the United States and CAWCD dated December 1, 1988, and any amendment or revision thereof, the costs associated with such water from CAWCD's repayment obligation and such costs shall be nonreimbursable.

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SEC. 3708. SATISFACTION OF CLAIMS.

* * *

(f) CLAIMS.--(1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water. Any such claim shall be filed within two years of the date of enactment of this Act, and shall be heard by the court on an expedited basis. If such a claim is filed and the court grants judgment for the plaintiff(s), the court shall award such relief as it deems proper, and shall award costs and attorneys' fees to the plaintiff(s). Any judgment of the court shall be subject to appeal on the same basis that other judgments of that court are subject to review under existing law.

(2) For purposes of this subsection,"claim" means a claim that the reallocation of water to the Tribe pursuant to

section 3704(a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water.

APPENDIX H

DEPARTMENT OF THE INTERIOR
Office of the Secretary

Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision

March 24, 1983

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of final water allocations to Indian and non-Indian water users and related decisions.

SUMMARY: The purpose of this action is to provide notice of final decisions made by the Secretary of the Interior concerning the allocation of water developed by the Central Arizona Project (CAP) to Indian and non-Indian water users, the conditions upon which those allocations were made, and water service contracting.

FOR FURTHER INFORMATION CONTACT: David G. Houston, Deputy Assistant Secretary, Land and Water Resources, U.S. Department of the Interior, Washington, D.C. 20240. Telephone: (202) 343-5676.

SUPPLEMENTARY INFORMATION: Previous Department of the Interior notices concerning CAP water allocations were published in the Federal Register on December 20, 1972, April 18, 1975, October 18, 1976, August 8, 1980 and December 10, 1980. Previous notices concerning compliance with the National Environmental Policy Act of 1969 in connection with CAP water allocations were published on June 2, 1981, December 4, 1981, December 11, 1981, and March 24, 1982.

These decisions were made pursuant to the authority vested in the Secretary of the Interior by the Reclamation Act of 1902, as amended and supplemented (32 Stat. 388, 43 U.S.C.

391) and the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885, 43 U.S.C. 1501), the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1505) and the Implementing Procedures of the U.S. Department of the Interior (516 DM 5.4), and in recognition of the Secretary's trust responsibilities to the Indian tribes of central Arizona. They were made after full consideration by the Secretary and his staff of the decisionmaking records and activities of previous Secretaries of the Interior on the subject of CAP water allocations, the draft and final environmental impact statements prepared on Water Allocations and Water Service Contracting, Central Arizona Project (INT-DES 81-50 and INT-FES 82-7 respectively), and the views of members of the public, officials of other Federal agencies and the State of Arizona, Members of the Congress, Indian tribes and environmental organizations presented in the form of written comments and correspondence or orally at meetings and public hearings held in connection with the allocations and environmental impact statements.

Decision

The Secretary of the Interior has elected to allocate waters developed by the Central Arizona Project (CAP) and to proceed with water service contracting with Indian and non-Indian users for the delivery of Arizona's remaining entitlement to Colorado River water. This decision allocates 309,828 acre-feet annually of water for Indian use (see Table 1) and 640,000 acre-feet annually for municipal and industrial (M&I) use (see Table 2), with the remaining supply for non-Indian agricultural use (see Table 3).

These allocations will, however, be subject to the following conditions:

1. The Gila River Indian Community will be offered a water service contract for 173,100 acre-feet per year for irrigation purposes on the reservation subject to acceptance of feasible non-potable water exchanges and subject to a 25

percent reduction in water short years with the remaining 75 percent of the irrigation allocation on a priority basis with 510,000 acre-feet of non-Indian M&I allocations.

2. Indian entities with existing contracts which provide for non-potable water exchanges will be required to accept non-potable water exchanges where feasible and consistent with contractual provisions.

3. Allocations to tribal homelands are intended to serve irrigation, domestic, municipal, and industrial uses on the Reservations and repayment of allocated project costs will be based on actual uses of the water and will be in accordance with applicable statutes.

4. The M&I allocation of 640,000 acre-feet per year can be made more firm by executing feasible non-potable effluent exchanges with Indian tribes. This allocation is subject to adoption of a pooling concept whereby all M&I allottees share in the benefits of effluent exchanges.

5. Water service contracting with M&I entities will proceed in accordance with this decision and based on quantities delineated on Table 2 herein.

6. An initial contracting period extending for 6 months will be provided and, in the absence of extenuating circumstances, the expiration of such period will lead to a request on behalf of the Secretary for the Arizona Department of Water Resources (DWR) to recommend reallocation of any remaining M&I and non-Indian agricultural water not contracted for during the initial contract period.

7. All water not contracted for, or contracted for but not expected to be utilized during interim periods, will be retained under jurisdiction of the Secretary and will be marketed on an interim basis to expedite repayment of the CAP.

CAP Water Allocation Description

The decision is to allocate 309,828 acre-feet of CAP water annually to 12 Indian entities for irrigation or for maintaining tribal homelands; and to accept the State of

Arizona's 1982 allocation recommendations for non-Indian users, which provide 640,000 acre-feet annually for M&I use, with the remaining supply for non-Indian agricultural use.

The quantities allocated to Indian users and the purposes they will serve are shown in Table 1.

TABLE 1. -- CAP WATER ALLOCATIONS, INDIAN COMMUNITIES

Units: Acre-feet			
Entity	Irrigation	Tribal homeland[1]	Total
Ak Chin	58,300		58,300
Camp Verde		1,200	1,200
Fort McDowell		4,300	4,300
Gila River	173,100		173,100
Papago-Chuichu	8,000		8,000
Papago-San Xavier		27,000	27,000
Papago-Schuk Toak		10,800	10,800
Pasqua Yaqui		500	500
Salt River	13,300		13,300
San Carlos	2,700	10,000	12,700
Tonto Apache		128	128
Yavapai		500	500
Total	255,400	54,428	309,828

[1] Includes irrigation, domestic, municipal, and industrial uses on the Reservation.

To ensure that maximum beneficial use is made of CAP water supplies in conjunction with available Arizona water supplies, Indian entities with existing contracts which provide for non-potable water exchanges will be required to accept non-potable water in exchange for CAP Indian irrigation allocations where feasible and consistent with contractual provisions. During years of water supply shortages. Indian users and non-Indian M&I users would share a first priority on project water supplies. Depending upon severity of shortages, project water delivery for miscellaneous uses would be reduced pro rata until exhausted; next, non-Indian agricultural uses would be reduced the same way until exhausted; next, the Gila Tribe allocation would be reduced 25 percent and other Indian irrigation uses would be reduced 10 percent on a pro rata basis until exhausted. Thereafter, the remaining water contracted for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (the 510,000 acre-feet of M&I supply is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year.

It is further decided that the water allocated to tribal homelands, under provisions of these CAP water allocations, shall be defined to serve irrigation, domestic, municipal, and industrial uses and purposes on the Reservations and repayment shall be subject to applicable law based on the actual use of the water.

The Secretary of the Interior will retain the right to contract for water sales on an interim basis where Indian water allottees are not utilizing the full CAP allotment as provided herein.

The quantities allocated to the M&I entities recommended for CAP water by the DWR in 1982 are shown in Table 2 below. The allocations include 71 municipal users, 2 power companies, 8 mining companies, 2 recreational entities, and 2 other applicants that do not fall under any of these categories.

Table 2. -- Cap Water Allocations Municipal and Industrial[1]

[Units: Acre-feet]

Entity	Schedule of demand			
	County	1985	2005	2034
M&I (municipal):[1]				
Aqua Fria (Citizens Util. Co.)	Mar			1,439
Apache Jct. (Az. Water Co.)	Pinal			6,000
Avondale	Mar			4,099
Berneil Water Co	Mar			432
Buckeye	Mar			[2]25
Camp Verde Water Co	Other			1,443
Casa Grande (Az. Water Co.)	Mar			8,884
Carefree Ranch Water Co	Mar			954
Carefree Water Co	Mar			400

Entity	Schedule of demand			
	County	1985	2005	2034
Cave Creek Water Co	Mar			1,600
Chandler	Mar			3,668
Chandler Heights I.D.	Mar			315
Chaparral City Water Co	Mar			6,978
Clearwater Co	Mar			2,849
Coolidge (Az. Water Co.)	Pinal			2,000
Community Water Co. (Grn. Vly.)	Pima			1,100
Consolidated Water Co	Mar			3,932
Cortaro-Marana I.D	Pima			47
Cottonwood Water Co	Other			1,789
Crescent Valley Water Co	Mar			2,697
Del Lago	Pima			786
Desert Ranch Water Co	Mar			139

Entity	Schedule of demand			
	County	1985	2005	2034
Desert Sage Water Co	Mar			5,933
Desert Sands Water Co	Mar			768
Eloy	Pinal			2,171
E&R Water Co	Other			161
Florence	Pinal			1,641
Florence Gardens	Pinal			407
Flowing Wells I.D	Pima			4,354
Foothills Water Co	Pima			1,652
Gilbert	Mar			7,235
Glendale	Mar			14,083
Globe	Other			3,480
Goodyear	Mar			2,374
Green Valley Water Co	Pima			1,900
Ironwood Water Co	Mar			393
Litchfield Park Serv. Co	Mar			5,580
Maricopa Mtn. Water Co	Pinal			108

Entity	Schedule of demand			
	County	1985	2005	2034
Mayer-Humboldt Water Co	Other			332
McMicken I.D	Mar			9,513
Mesa	Mar			20,129
Miami-Claypool (Az. Water Co)	Other			1,829
Midvale Farms Water Co	Pima			1,500
New Pueblo	Pima			237
New River Utility Co	Mar			2,359
Nogales	Other			3,949
North Valley Water Co	Mar			393
Palm Springs Water Co	Pinal			2,919
Paradise Valley Water Co	Mar			3,231
Payson	Other			4,995
Peoria	Mar			15,000
Phoenix	Mar			113,882
Prescott	Other			7,127

Entity	Schedule of demand			
	County	1985	2005	2034
Queen Creek I.D	Mar			944
Ranch Lands Water Co	Pima			393
Rio Rico (Citizens Util. Co.)	Pima			2,683
Rio Verde Util. Inc	Mar			812
San Tan I.D	Mar			236
Scottsdale	Mar			19,702
Sun City (Citizens Util Co.)	Mar			15,835
Sunrise Water Co	Mar			944
Sunshine Water Co	Mar			16
Tempe	Mar			4,315
Trails End Water Service	Other			226
Tucson	Pima			151,064
Turner Ranches	Mar			3,932
West End Water Co	Mar			157
West Phoenix Water Co	Mar			91

Entity		Schedule of demand		
	County	1985	2005	2034
White Tank (Az. Water Co.)	Mar			968
William A. F. Base	Mar			833
Youngtown	Mar			380
Subtotal				494,742
M&I (Power):				
Az. Publ. Serv./Salt Rv. Proj		55,400	[3]	[4]43,218
M&I (Mines):				
Anamax, Twin Buttes	Pima	6,105	[3]	4,444
Asarco -- Hayden	Other	833	[3]	582
-- Mission	Pima	4,161	[3]	[5]0
Cities Serv. Co	Other	3,285	[3]	2,271
Cyprus-Pima	Pima	7,263	[3]	5,339
Duval	Pima	11,628	[3]	8,549
Inspiration Copper	Other	4,647	[3]	2,906
Kennecott	Other	28,611	[3]	2,028
Phelps-Dodge	Other	20,866	[3]	14,665
Subtotal Mines				60,784

Entity		Schedule of demand		
	County	1985	2005	2034
M&I (Recreation):				
Az. Game & Fish Dept	Mar	755	[3]	324
Maricopa County	Mar	852	[3]	665
Subtotal -- Rec				989
M&I (Other):				
Phx. Memorial Park	Mar			84
State Land Department				39,006
Subtotal -- Other				39,090
Total				[6]638,823

[1] Municipal subcontractors will be allowed to use up to the amount of water identified for the year 2034 at any time during the contract repayment period.

[2] The maximum allocation shall be 434 acre-feet until 2005, then reducing to 25 acre-feet per year for the year 2034.

[3] Subcontractors will be allowed to utilize the indicated amount until such time that all M&I use totals 640,000 acre-feet.

[4] Distribution between the two entities to be determined during contract negotiations.

[5] No request for water in the year 2034.

[6] Rounded to 640,000.

To ensure that maximum use is made of available CAP water supplies, the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water

allottees are not utilizing the full CAP allotment as provided herein.

The allocations to M&I users can be made more firm by, and are premised on expectations that, municipal effluent in quantities of least 100,000 acre-feet per year will be exchanged with Indian users. These expectations are consistent with the Indian allocations where this decision provides that exchanges will be required where feasible and consistent with contractual provisions. Exchanges will be treated under a pooling concept whereby benefits of exchange will accrue to all M&I users.

The CAP water allocations to the non-Indian agricultural users shall include the remaining supplies and are expressed as percentages of water available to non-Indian agriculture. These agricultural entities range in size from 90 acres to over 150,000 acres and include 23 irrigation districts or farming operations. Table 3 below provides the percent of supply available for each entity.

As previously noted for Indian allottees and non-Indian municipal and industrial allottees, the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water allottees are not utilizing the full CAP allotment as provided herein.

TABLE 3. -- CAP WATER ALLOCATION
NON-INDIAN IRRIGATION[1]

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
Arcadia Water Company	0.13		
Arva Valley Assocation	3.69		

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
Central Arizona Irrigation District	18.01		
Chandler Heights Irrigation District	.28		
Cortaro-Marana Irrigation District	2.14		
FICO	1.39		
Harquahala Valley Irrigation District	7.67		
Hohokam Irrigation District	6.36		
La Croix	.04		
Maricopa-Stanfield Irrigation District	20.48		
Marley, Jemper Jr.	.04		
McMicken Irrigation District	7.28		
MCMWCD #1	4.66		
New Magma Irrigation District	4.34		
Queen Creek Irrigation District	4.83		
Rood, W. E.	.04		
Roosevelt Irrigation District	2.61		

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
RWCD	5.98		
Salt River Project	2.97		
San Carlos Irrigation District[3]	4.09		
San Tan Irrigation District	.77		
Tonopah Irrigation District	1.98		
U.S. Forest Service	.22		
Total	100.00		

[1] During shortages, all M&I and Indian uses would have priority over non-Indian irrigation. When available, non-Indian irrigation shares the project supply available for this purpose according to the listed percentages. These allocations are based in part on recommendations from the State of Arizona and percentages shown are reflective of those provided in correspondence to the Secretary of the Interior dated January 18, 1982, and November 10, 1982, from the Arizona Department of Water Resources.

[2] The allocation for years subsequent to 1985 will be based on the 1985 allocation minus the supply that would have been delivered to eligible lands that have been converted to M&I or otherwise removed from irrigation. Contract language similar to that contained in the letter to the Secretary of the Interior from the Arizona Department of Water Resources dated November 10, 1982, will be included in all non-Indian irrigation subcontracts.

[3] The water service subcontract among the United States, the Central Arizona Water Conservation District (CAWCD) and the San Carlos Irrigation District (District) will not require the District to reduce the amount of groundwater pumped by the amount of CAP water received. However, the subcontract will require that the District continue to employ measures adequate in the judgment of the Secretary and the CAWCD to control expansion of irrigation in the contract service area and to reduce pumping of groundwater consistent with, and to comply in all other respects with, Arizona's statutory requirements.

During years of water supply shortages, Indian users and non-Indian M&I users would share a first priority on project water supplies. Depending upon severity of shortages, miscellaneous uses would be reduced pro rata until exhausted; next, non-Indian agricultural uses would be reduced the same way until exhausted; next, 25 percent of the Gila Tribe allocation and 10 percent of the irrigation amount allocated to Indian contractors other than the Gila Tribe would be reduced pro rata until exhausted. Finally, the remaining water contracted for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (510,000 acre-feet for M&I is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year.

Description of Alternative Allocations

The following alternatives were considered by the Department in reaching its decision:

A. *Options*--Water Allocation

A.1. *No Action.* The "No Action" alternative would allocate CAP water based upon the demands anticipated during the planning stages of the project: M&I deliveries at 82,000 acre-feet, 232,000 acre-feet, and 312,000 acre-feet, in years

1975, 1990, and 2000 and after, respectively, in the metropolitan Phoenix and Tucson areas. The remainder would go to agricultural users (both Indian and non-Indian) shared pro rata on acreage developed for irrigation.

A.2. *Kleppe Allocation With 1981 State Recommendations.* Five central Arizona Indian tribes would be allocated 257,000 acre-feet annually for irrigation use until 2005, thereafter 10 percent of total project supplies or 20 percent of project agricultural supplies, whichever was to their advantage. M&I users would be allocated from 190,242 acre-feet (1985) to 719,992 acre-feet (2034) annually. The remainder of the CAP supplies would be shared by 23 irrigation districts or farming operations pro rata based on eligible acres.

A.3. *Andrus Allocation With 1981 State Recommendations.* This provides 12 Indian tribes or communities with a total of 309,828 acre-feet annually for irrigation or for maintaining tribal homelands. The 1981 State recommendations provide from 190,242 (1985) to 514,000 (2034) acre-feet annually to 81 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all miscellaneous uses and then to non-Indian irrigation uses, then 10 percent of the Indian irrigation amount is reduced until exhausted. Finally, the remaining Indian irrigation and tribal homeland amounts are reduced pro rata with no more than 510,000 acre-feet per year of M&I uses, based on amount of water actually delivered to each entity in the most recent past year of full deliveries to these entities.

A.4. *Andrus Allocation Modified To Favor M&I Use.* The Indian allocations are the same as Alternative 3, the differences being in the distribution in times of shortage. The alternative allocates from 190,242 acre-feet (1985) to 697,020 acre-feet (2034) annually to 81 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all

miscellaneous uses and then to non-Indian irrigation uses, then 25 percent of the Indian irrigation amount is reduced until exhausted. Finally the remaining Indian irrigation and tribal homeland amounts are reduced pro rata with all M&I uses, based on the scheduled amounts of water (demand) for each entity in the current year. In addition, effluent exchanges (full time) of not less than 100,000 acre-feet per year are assumed for the Salt River and Gila River reservations in amounts not to exceed 20 percent of the individual tribe's allocation prior to 2005, nor more than 50 percent after 2005.

A.5. *Andrus Allocation Modified To Favor Indian Use.* The Indian allocations are the same as Alternative 3, the differences being in the distribution in times of shortages. This alternative allocated from 190,242 acre-feet (1985) to 578,010 acre-feet (2034) annually to 81 M&I entities with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all miscellaneous uses and then to non-Indian irrigation and non-municipal M&I use. Finally, the Indian allocated amounts are reduced pro rata with the M&I (municipal only) amounts based on the quantity of water actually delivered to each entity in the most recent past year of full deliveries. There is no prior 10 percent reduction in Indian agricultural use.

A.6. *Agency Proposed Action With 1982 State Recommendations.* The Agency Proposed Action is to allocate 309,828 acre-feet annually to 12 Indian tribes for irrigation or for maintaining tribal homelands. The 1982 State Recommendations provide 640,000 acre-feet annually (2034) to 85 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries would be reduced until exhausted first to all miscellaneous uses and then to non-Indian agricultural use, next, 25 percent of the Gila Tribe allocation and 10 percent of the irrigation amount allocated to Indian contractors other than the Gila Tribe would be reduced pro rata until exhausted. Finally, the remaining water contracted

for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (510,000 acre-feet for M&I is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year. In addition, effluent exchanges would be required for tribal entities where feasible and consistent with contractual provisions.

B. *Options*--Effluent Exchange

B.1. Effluent exchanges optional for tribal contractors, but not required.

B.2. Effluent exchanges with Indian tribes required where feasible and consistent with contractual provisions (i.e., where conditions specified in individual Indian contracts are met).

B.3. Allocations made consistent with option B.2., with the proviso that CAWCD will implement the "pooling concept."

B.4. Allocations made consistent with Option B.3., with added contractual provision that M&I allocations will be adjusted if effluent exchanges are not implemented.

B.5. Allocations made consistent with Option B.2., but cities would be allowed to individually exchange effluent with Indian users.

C. *Options*--Tribal Homeland

C.1. Do not define purpose of water allocated to tribal homeland at this time.

C.2. Define purpose of water allocated to tribal homeland as domestic, municipal, and industrial.

C.3. Define purpose of water allocated to tribal homeland as agricultural irrigation and therefore capital costs would be deferred under the Leavitt Act.

C.4. Define purposes of water allocated to tribal homeland as any use necessary to ensure intended purpose of the reservation including irrigation, domestic, municipal, and industrial.

Contracts would be interpreted pursuant to the *Rules, Regulations, and Determinations* provisions of the contracts to provide for appropriate repayment consistent with the actual use of the water.

C.5. Define and interpret purposes of water allocated to tribal homelands consistent with option C.4 with added clarification that agricultural irrigation uses would be subject to priority reduction of 10 percent in water short years before sharing a priority basis with non-Indian M&I.

Background for Decision

Authorized as part of the Colorado River Basin Project Act (Pub. L. 90-537) in 1968, the CAP is a multi-purpose water project which will deliver water for irrigation, municipal and industrial uses in central and southern Arizona, and by exchange, to users in western New Mexico and on Gila River tributaries upstream for CAP facilities in Arizona.

The water users can be divided into four categories: Indian agricultural irrigation, tribal homeland, non-Indian agriculture, and non-Indian M&I.

The Secretary of the Interior has the responsibility for allocating CAP waters. A final allocation of CAP water and a contract with the Secretary for delivery of the water is required so that facilities can be designed and constructed to treat (where necessary) and deliver the CAP water to the point of use. In many cases, the delivery facilities will be extensive, or will require negotiation for joint use of existing facilities, and adequate lead time is required if the users will be able to take water when the CAP comes on-line.

The main CAP aqueduct system is currently scheduled to make water deliveries to the Phoenix and Pinal county areas in 1985, and to the Tucson area in 1989 or 1990. Even if the allocations are made without delay, it is likely that some of the eventual recipients of CAP water will be unable to take delivery when the water is first made available.

On November 12, 1981, Secretary Watt provided guidance to the Bureau of Reclamation with regard to his proposed action on CAP allocations to the Indian sector. Based on the Secretary's proposal, the DWR prepared final recommendations for the allocation of CAP water to the non-Indian sector. The recommendations were forwarded to the Secretary in letters dated January 18, 1982, April 6, 1982, and November 10, 1982. These proposed Indian allocations, along with the State's recommendations for non-Indian allocations, comprised the Agency Proposed Action in the final EIS on Water Allocations and Water Service Contracting, Central Arizona Project, which was prepared by the Bureau of Reclamation and filed with the Environmental Protection Agency on March 19, 1982.

Non-Indian agricultural water users are expected to contract for and receive water available from the CAP facilities which is not being utilized in the early years by the M&I and Indian contractors. The amount of this water will be relatively substantial in the early years of the project and during years of high runoff in the Colorado River Basin. Amounts are expected to decrease during the project life as the M&I use increases.

The Department's allocation (Alternative 6) contains elements of Alternatives 3 (Andrus) and 4 (Andrus Modified for M&I). The magnitude of the alternative allocations is identical, but the distribution of the project water during times of shortage combines elements of both. Under the Andrus allocation (Alternative 3) during shortages, 10 percent of Indian allocations for irrigation use would be reduced until exhausted prior to a pro rata reduction of the remaining Indian irrigation and tribal homelands amounts on a shared priority basis with 510,000 acre-feet per year of non-Indian M&I uses. The Andrus Modified for M&I Alternative (Alternative 4), provides that during shortages, 25 percent of the Indian irrigation amount would be reduced until exhausted prior to a pro rata reduction of the remaining Indian irrigation and tribal homeland amounts with all non-Indian M&I uses. The Department's Indian

allocation is a combination of these two shortage distribution formulas. Like the Andrus allocation, the shortage distribution maintains the 510,000 acre-feet per year formula value for non-Indian M&I use, as well as the 10 percent reduction in Indian irrigation use for the 11 tribes or communities affected by water service contracts executed in December 1980 (all except the Gila River Indian Reservation). However, like Aternative 4 (Andrus Modified for M&I Use), the Gila River Indian Reservation's allocation would be reduced by 25 percent prior to the pro rata reduction.

Like Alternative 4, the Department's allocation will require effluent exchanges where feasible and consistent with contract provisions. However, in addition to the exchanges with the Salt River and Gila River Reservations described for Alternative 4, the analysis also assumes exchanges between the city of Tucson and the San Xavier Indian Reservation.

Discussion of the Environmental Consequences of the Alternatives

The requirements of the National Environmental Policy Act have been integrated into all phases of planning and development of the Central Arizona Project. A programmatic Environmental Impact Statement (EIS) was completed in 1972 and several site-specific statements have been or are in the process of being done on individual features of the project. The Bureau of Reclamation prepared a final EIS on Water Allocations and Water Service Contracting, Central Arizona Project in March 1982. Copies of the final EIS are available to the public upon request.

The Bureau addressed two general categories of impacts: The first category was impacts due to demographic and land use changes resulting from the availability or unavailability of CAP water; or due to the varying amount of CAP water made available. The second category was due to distribution system construction and development of lands for irrigation. Such actions impact wildlife and wildlife habitat, cultural resources,

social/economic conditions, groundwater quantity, population, and land use.

The agency-proposed action was derived from an institutional process that involved soliciting expressions of interest to contract for CAP water from the Arizona Indian tribes; and from requesting the State of Arizona to make recommedations on allocating CAP water for M&I use and non-Indian agriculture.

On November 12, 1981, the Secretary selected a proposed Indian allocation (Proposed Action) in order to facilitate the timely completion of the EIS. In light of the Secretary's proposed action to allocate CAP water to Indians, the State of Arizona was asked to make recommendations on allocating CAP water to non-Indians. By letters to the Secretary dated January 18, 1982, April 6, 1982, and November 10, 1982, the DWR made such recommendations after extensive public involvement procedures.

The relative differences in environmental impacts among the allocation alternatives generally are not significant. The Proposed Action provides a significant benefit to the tribes by assuring a relatively stable and predictable water supply for domestic and economic development. However, by making a reasonable reduction in the Gila Indian Reservation's allocation during times of water supply shortage, additional water is made available for non-Indian municipal and industrial use. Compared to alternatives 3 and 5 over the 50-year repayment period of the CAP, the Proposed Action is projected to deliver about 2,500,000 acre-feet more to the M&I sector, and over 1,000,000 acre-feet more to the non-Indian agricultural sector, while maintaining the essential benefits of CAP water deliveries to the tribes. The increased delivery to the M&I sector avoids locally severe impacts of water supply shortfalls in Apache Junction under alternatives 3 and 5, and to the Kennecott and Phelps Dodge mining operations under alternatives 1 and 5. Under the Proposed Action significantly less farmland would be

retired for acquisition of ground-water rights by municipalities than under alternatives 1 and 2. Hence, the Proposed Action, which falls within the range of alternatives 3 and 4 and the resulting environmental impacts is considered to be the environmentally preferred alternative.

There will also be some differing levels of environmental impacts, associated with constructing canals and laterals to deliver CAP water to Indian and non-Indian users. Future environmental analysis of individual delivery systems will include, where appropriate, the evaluation of all reasonable alternatives. All practical means to avoid or minimize adverse environmental impacts will be achieved through specific mitigation measures and monitoring provisions imposed upon the water user in the subcontract and construction specifications.

1. *Impacts from Demographic and Land Use Changes.* The Bureau's analysis indicates that there would be no significant difference in the acreage of undeveloped desert that would be converted to urban use over the 50-year project period under any of the alternative CAP water allocations (about 165,000 acres under each of the alternatives). A loss of that wildlife now associated with that desert habitat would also be expected. The amount of habitat is part of almost 20 million acres of Sonoran Desert scrub vegetation estimated to exist in Arizona.

The amount of farmland to be converted to urban use within the project service area over the 50-year project period would be about 34,500 acres for each of the alternatives. This would mean a loss of crops grown on converted farmland, predominantly cotton. The significance of impact is revealed by comparing about 34,500 acres of irrigated farmland to be lost as a result of urbanization of the estimated 792,500 harvested acres now being irrigated in the project area. The amount of irrigated farmland to be lost amounts to about 5 percent of the total farmland now being irrigated.

Some agricultural lands may be retired to make water available (grandfathered water rights) to nearby municipalities

if required to sustain projected population growth. Since the alternative CAP allocations would provide water in varying quantities for municipal use, in some cases, the combination of CAP and other dependable water supplies would not meet the demands of the projected population of a given municipality. In those cases, retirement of farmland was assumed as the most likely means for increasing the water supplies. It is estimated that a maximum of 6,900 acres would be retired from cultivation under any of the CAP allocation alternatives to meet the water demands of the municipal sector. It will take a period of time before any kind of natural vegetation is reestablished on this land. In addition, it will mean the loss of farm revenues for those now cultivating the land.

Another impact of retiring farmland is the added particulate matter in the area of abandoned fields. Retiring farmland would exacerbate the already existing problem of dust storms and fugitive dust until vegetation has recovered sufficiently to alleviate the problem.

Anticipated changes in land use on the 10 Indian reservations are not expected to be significant. While in excess of 90,000 acres have been developed for irrigation on the ten reservations, it is estimated that 50,100 acres of land are under irrigation at the present time. An additional 28,149 acres of land could be developed for irrigation under the CAP action alternatives.

Much of the irrigation use of CAP water on Indian reservations would take place on lands previously developed for irrigation. However, some of these lands were subsequently abandoned and have reverted to native vegetation, and the redevelopment of this acreage would cause wildlife habitat losses. It is also possible that the redevelopment of these lands could have adverse impacts on cultural resources that may remain partially intact.

In all cases there will be a beneficial economic impact to tribes with any of the CAP action alternatives. Alternatives 3, 4, 5, and 6 provide an added significant benefit to the tribes by

assuring a relatively stable and predictable water supply for domestic and economic development on Indian reservations. Additional jobs would be generated, per capita income would be increased, and the life style of the reservation residents would be upgraded.

Since CAP water would be used primarily as a substitute for groundwater, no changes in land use or other impacts are expected as a direct result of the non-Indian agricultural allocations. However, differences in allocations to M&I users could lead to farmland retirement within agricultural districts. There will also be some impacts on fish and wildlife, as well as land use, as irrigation delivery facilities such as canals and laterals are constructed to deliver CAP water to these entities.

2. *Impacts of Constructing Distribution Systems.* There will be some environmental impacts associated with constructing canals and laterals to deliver CAP water to Indian and non-Indian users. At least 40 to 50 miles of canals will be required to deliver the Indian allocation of CAP water. Most of this land will be Sonoran Desert, but some will be retired agricultural land, existing irrigated agricultural land, or undeveloped urban lands. In addition, perhaps as much as 500 miles of canals and pipelines will be required to deliver irrigation and M&I water to non-Indian entities. Under a "worst case" scenario, assuming a 66-foot construction right-of-way, 4,400 acres would be disturbed, including both developed and undeveloped land.

No adverse impacts on special status species are anticipated as a result of CAP water allocations. Changes in land use, such as development of undisturbed wildlife habitat, were projected for each of the action alternatives. The difference among the alternatives is minimal, certainly not significant in the context of endangered species habitat.

The abundance of cultural resources in the CAP area is disappearing at an increasing rate as population grows and development continues. Exact inventories of the cultural

resources and an analysis of impacts can be made only when the precise areal extent of projected land use modifications are defined. At that time, intensive archaeological/historical surveys of the above defined areas would be conducted. Generally, however, of the possible scenarios, only the conversion of lands to agriculture could have significant impact.

In some cases, where planning for delivery facilities is incomplete and it appears that such facilities would be extensive, or would be constructed in environmentally sensitive areas, further environmental analysis may be required prior to execution of a water service subcontract.

Summary

Since CAP water would be used primarily as a substitute for ground water, no major changes in population, land use, or other social indicators are expected as a result of the water allocations. Without the delivery of M&I water, the CAP service area population is projected to be just under 2.5 million by 2034. The area is projected to increase by an additional 100,000 persons by 2034 as a result of M&I water availability, representing an increase of approximately 4 percent over projected growth without CAP. The land use effects identified are of relatively minor magnitude and will not likely impose major economic effects on neighboring communities or lands.

In conclusion, the effect of CAP water would be twofold. First, the water would enable certain existing activities to be maintained at near-current levels. For example, agriculture would be able to sustain production while reducing the serious overdrafting of the ground water supplies. Second, CAP water would help to accommodate the population and economic growth that is projected for central Arizona.

Effect on Previous Decision

The decisions contained herein supersede those made by Secretary Andrus on December 5, 1980, and to the extent those decisions are inconsistent with these decisions, they are rescinded.

Dated: February 10, 1983.

James G. Watt,

Secretary of the Interior.

APPENDIX I

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND THE MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT PROVIDING FOR WATER SERVICE

CENTRAL ARIZONA PROJECT

* * *

3. DEFINITIONS:

Definitions included in the Repayment Contract are applicable to this subcontract; *Provided, however*, That the terms "Agricultural water" or "Irrigation water" shall mean water used for the purposes defined in the Repayment Contract on tracts of land operated in units of more than 5 acres. The first letters of terms so defined are capitalized herein. As heretofore indicated, a copy of the Repayment Contract is attached as Exhibit "A."

4. DELIVERY OF WATER:

4.1 *Obligations of the United States.* Subject to the terms, conditions, and provisions set forth herein and in the Repayment Contract, during such periods as it operates and maintains the Project Works, the United States shall deliver Project Water for Agricultural use by the Subcontractor. The United States shall use all reasonable diligence to make available to the Subcontractor the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4. After transfer of OM&R to the Operating Agency, the United States shall make deliveries of Project Water to the Operating Agency which shall make subsequent delivery to the Subcontractor as provided herein.

* * *

4.4 *Procedure for Ordering Water.*

(a) At least 15 months prior to the date the Secretary expects to issue the Notice of Completion of the Water Supply System, or as soon thereafter as is practicable, the Contracting Officer shall announce by written notice to the Contractor the amount of Project Water available for delivery during the Year in which said Notice of Completion is issued (initial Year of water delivery) and during the following Year. Within 30 days of receiving such notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor. The Subcontractor shall, within a reasonable period of time as determined by the Contractor, submit a written schedule to the Contractor and the Contracting Officer showing the quantity of water desired by the Subcontractor during each month of said initial Year and the following Year. The Contractor shall notify the Subcontractor by written notice of the Contractor's action on the requested schedule within 2 months of the date of receipt of such request.

(b) The amounts, times, and rates of delivery of Project Water to the Subcontractor during each Year subsequent to the Year following said initial Year of water delivery shall be in accordance with a water delivery schedule for that Year. Such schedule shall be determined in the following manner:

(i) On or before June 1 of each Year beginning with the Year following the initial Year of water delivery pursuant to this subcontract, the Contracting Officer shall announce the amount of Project Water available for delivery during the following Year in a written notice to the Contractor. In arriving at this determination, the Contracting Officer, subject to the provisions of the Repayment Contract, shall use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract. Within 30 days of receiving

said notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor.

(ii) On or before October 1 of each Year beginning with the Year following said initial Year of water delivery, the Subcontractor shall submit in writing to the Contractor and the Contracting Officer a water delivery schedule indicating the amounts of Project Water desired by the Subcontractor during each month of the following Year along with a preliminary estimate of Project Water desired for the succeeding 2 years.

(iii) Upon receipt of the schedule, the Contractor and the Contracting Officer shall review it and, after consultation with the Subcontractor, shall make only such modifications to the schedule as are necessary to ensure that the amounts, times, and rates of delivery to the Subcontractor are consistent with the delivery capability of the Project, considering, among other things, the availability of water and the delivery schedules of all subcontractors.

(iv) On or before November 15 of each Year beginning with the Year following said initial Year of water delivery, the Contractor shall determine and furnish to the Subcontractor and the Contracting Officer the water delivery schedule for the following Year which shall show the amount of water to be delivered to the Subcontractor during each month of that Year, contingent upon the Subcontractor remaining eligible to receive water under all terms contained herein.

* * *

4.13 *Entitlement to Project Agricultural Water.*

(a) Commencing with the Year in which the Secretary issues the Notice of Completion of the Water Supply System and for each Year thereafter until the term of this subcontract expires, the Subcontractor's entitlement to Agricultural Water each Year shall be equal to 20.48 percent of the total supply of Agricultural Water available for delivery from the Project in the same Year; minus the amount of Project

Agricultural Water that would have been delivered to eligible lands in the Subcontractor's service area that have been converted to M&I use or have otherwise been removed from irrigation as determined by the Contracting Officer and calculated on the basis of a uniform delivery amount per acre to all eligible lands in the Subcontractor's service area at the time of execution of this subcontract; plus 20.48 percent of the sum of deductions made in all subcontractors' entitlements to reflect removal of eligible lands from agricultural use; *Provided, however,* That after consultation with the Subcontractor, the Contracting Officer may. from time to time, adjust said percent of the sum of deductions as he determines necessary to more accurately reflect the Subcontractor's equitable share of such water.

* * *

5. PAYMENTS:

5.1 *Water Service Charges for Payment of Operation, Maintenance, and Replacement Costs.* Subject to the provisions of Article 5.4 hereof, the Subcontractor shall pay in advance for Project OM&R costs estimated to be incurred by the United States or the Operating Agency. At least 15 months prior to first delivery of Project Water, or as soon thereafter as it practicable, the Contractor shall furnish the Subcontractor with an estimate of the Subcontractor's share of OM&R costs to the end of the initial Year of water delivery and an estimate of such costs for the following Year. Within a reasonable time of the receipt of said estimates, as determined by the Contractor, but prior to the delivery of water, the Subcontractor shall advance to the Contractor its share of such estimated costs to the end of the initial month of water delivery and without further notice or demand shall on or before the first day of each succeeding month of the initial Year of water delivery and the following Year advance to the Contractor in equal monthly installments the Subcontractor's share of such estimated costs. Advances of monthly payments for each subsequent Year shall be made by

the Subcontractor to the Contractor on the basis of annual estimates to be furnished by the Contractor on or before June 1 preceding each said subsequent Year and the advances of payments for said estimated costs shall be due and payable in equal monthly payments on or before the first day of each month of the subsequent Year. Differences between actual OM&R costs and estimated OM&R costs shall be determined by the Contractor and shall be adjusted in the next succeeding annual estimates; *Provided, however*, That if in the opinion of the Contractor the amount of any annual OM&R estimate is likely to be insufficient to cover the above-mentioned costs during such period, the Contractor may increase the annual estimate of the Subcontractor's OM&R costs by written notice thereof to the Subcontractor, and the Subcontractor shall forthwith increase its remaining monthly payments in such Year to the Contractor by the amount necessary to cover the insufficiency. All estimates of OM&R costs shall be accompanied by data and computations relied on by the Contractor in determining the amounts of the estimated OM&R costs and shall be subject to joint review by the Subcontractor and the Contractor.

5.2 *Agricultural Water Service Charges.*

(a) Subject to the provisions of Article 5.4 hereof and in addition to the OM&R payments required in Article 5.1 hereof, the Subcontractor shall, in advance of the delivery of Project Agricultural Water by the United States for the Operating Agency, make payments to the Contractor in equal semiannual installments of an Agricultural Water service capital charge of $2.00 for each acre-foot of Agricultural Water scheduled for delivery to the Subcontractor pursuant to the provisions of Articles 4.4 and 4.13 hereof. The Agricultural Water service capital charge payment of the quantity of water available for the Subcontractor for the balance of the initial Year of water delivery shall be advanced to the Contractor prior to commencement of delivery of water. Thereafter, for each

subsequent Year, payments by the Subcontractor shall be made in equal semiannual installments on or before the December 1 preceding said subsequent Year and the June 1 of said subsequent Year as may be specified by the Contractor in written notices to the Subcontractor.

* * *

(c) On or before the first anniversary of execution of this subcontract and on or before each succeeding anniversary, until Notice of Completion of the Water Supply System is issued, the Subcontractor shall pay, in addition to all other payments required herein, an agricultural subcontract charge which shall be equal to the amount obtained by multiplying the percentage in Subarticle 4.13(a) by $500,000. Prior to the date of issuance of the Notice of Completion of the Water Supply System, the subcontract charge shall be paid each Year by the Subcontractor to the United States. The Contracting Officer shall advise the Contractor of the amounts and dates of the Subcontractor's payments.

(d) Funds advanced to the United States by the Subcontractor pursuant to Subarticle 5.2(c) as a subcontracting charge shall be credited by the Contractor against the Subcontractor's initial capital charges for water deliveries under this subcontract. Credit provided to the Subcontractor shall include interest from the date Subcontractor's funds are transferred to the United States through the effective date of credit for payment of capital costs as recorded in the Contractor's records. Interest credited to the Subcontractor shall be at an annual rate of 1 (one) percent less than the weighted rate received by the Contractor on all investments during the period for which the Subcontractor's payments earn an interest credit.

* * *

APPENDIX J

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

* * *

5.12 "Agricultural water" or "irrigation water" shall mean project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres.

* * *

5.27 "Project water" shall mean (a) all water allocated by the Secretary for project purposes by *Federal Register* notice dated March 24, 1983, and any subsequent reallocation by the Secretary as contemplated in paragraph 6 of said *Federal Register* notice, which water is available pursuant to contracts with the Secretary from: (1) the Colorado River; (2) Central Arizona Project dams and reservoirs; and (3) return flows captured by the Secretary for project use; (b) any water delivered to entities in Arizona, through the project works, as a replacement supply for Cliff Damn; (c) water delivered to water users in Arizona, through the project works, in exchange for water delivered to users in New Mexico from or by means of the project works; and (d) any additional water not included in (a) above, that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act of 1978 (Public Law 95-328), as amended on October 19, 1984 (Public Law 98-530); the Southern Arizona Water Rights

Settlement Act of October 12, 1982 (Title III of Public Law 97-293); and, subject to the execution of a settlement agreement by the Contractor providing for the settlement of the water rights claims of the Salt River Pima-Maricopa Indian Community and to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (Public Law 100-512), up to 22,000 acre-feet annually of Colorado River water to be delivered through the project works in accordance with said settlement agreement and legislation.

* * *

8. *DELIVERY OF WATER*

8.12 *No Guarantee of Availability of Water.* The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States, its officers, agents, or employees, be liable for any damages, direct or indirect, of whatsoever nature, arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping.

(2)

Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

No. 98-1115

In The

Supreme Court of the United States

October Term, 1998

MARICOPA-STANFIELD IRRIGATION and DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION and DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA; NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CENTRAL VALLEY PROJECT WATER ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a contract clause providing that the United States "assumes no responsibility with respect to the quantity of water available for delivery" excuse the government from liability where the government determines to reallocate the water to another user?

2. Are the rights to water provided by Reclamation pursuant to contract protected property of the landowners?

3. Is the Ninth Circuit's application of the "unmistakability doctrine" to absolve the government from liability when Congress reallocates previously contracted-for water to another use consistent with this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996)?

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CENTRAL VALLEY PROJECT WATER ASSOCIATION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. THIS CASE HAS BROAD IMPLICATIONS AFFECTING THE PROPERTY INTEREST OF FEDERAL RECLAMATION CONTRACTORS THROUGHOUT THE WESTERN UNITED STATES 3

II. CONTRARY TO DECADES OF THIS COURT'S OPINIONS, THE COURT OF APPEALS' DECISION APPEARS TO HAVE ABOLISHED FEDERAL RECLAMATION CONTRACTORS' PROTECTED PROPERTY INTEREST IN THE WATER 9

III. THE COURT OF APPEALS IGNORED THIS COURT'S DECISION IN *UNITED STATES V. WINSTAR* BY MISAPPLYING THE DOCTRINE OF UNMISTAKABILITY 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Ickes v. Fox, 300 U.S. 82 (1937) 10, 11, 12

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1957) 4, 9

Madera Irrigation District v. Hancock, 985 F.2d 1397 (1993) 15

Nebraska v. Wyoming, 325 U.S. 589 (1945) 11, 12

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1949) 5

United States v. Nevada, 463 U.S. 110 (1983) ... 12, 13, 15

United States v. Winstar Corp., 518 U.S. 839 (1996) 2, 13, 14, 15, 16, 17

CODES AND STATUTES

United States

43 U.S.C. § 321, *et seq.* 10

43 U.S.C. § 372 *et seq.* (1902) 3, 10

43 U.S.C. § 485 *et seq.* (1939) 5

43 U.S.C. § 485h-4 5

LEGISLATIVE AUTHORITY

Congressional Record – House, May 5, 1982 at 1837 4

Pub. L. No. 575, 106 Stat. 4706, §§ 3401-3412 (1992) 7

Pub. L. No. 575, 106 Stat. 4706, § 3406(b)(1)(B) 8

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 575, 106 Stat. 4706, § 3406(b)(2)..... 7

Pub. L. No. 575, 106 Stat. 4706, § 3406(b)(23)..... 7

Pub. L. No. 575, 106 Stat. 4706, § 3406(d)..... 7

INTEREST OF THE AMICUS CENTRAL VALLEY PROJECT WATER ASSOCIATION[1]

The Central Valley Project Water Association (CVPWA) is a voluntary organization of local government agencies and public utilities who hold contracts with the United States Bureau of Reclamation (Reclamation) for Central Valley Project (CVP) water. Contracts held by CVPWA members account for the majority of CVP water delivered for irrigation and municipal and industrial purposes. The federal Central Valley Project services agricultural, municipal and industrial water and power customers throughout the Central Valley from Redding to Bakersfield. CVP contractors have a responsibility to provide reliable and affordable water service to over 20,000 farms on three million acres of the nation's most productive farmland, and to two million households and industrial water users. CVP contracts were executed for the express purpose of meeting those responsibilities. Fulfillment of that obligation is the most critical charge to all of the CVP's contractors.

The Ninth Circuit Court of Appeals' decision may directly and adversely affect the member entities of the CVPWA. The CVPWA member entities' contracts contain certain provisions similar to those of the contractors at

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[1] Petitioners, Maricopa-Stanfield Irrigation and Drainage District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation and Drainage District, and Respondent, United States of America, have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

issue in this case. Unless reviewed and overturned, the Secretary of the Interior, through Reclamation, will have virtually unfettered discretion to reallocate water in which contractors have a protected property interest without just compensation. The CVPWA has a duty to speak on behalf of its members to ensure that their beneficial interest in water is fairly considered by Reclamation as it operates federal reclamation facilities.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case set forth in the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals' decision potentially affects federal contractors throughout the western United States under the federal Reclamation Program. If the decision is left standing without review, Reclamation will continue to unilaterally reallocate previously contracted-for water, thereby impairing protected property interests without providing just compensation.

In reaching its decision, the court of appeals has overlooked fundamental reclamation law concerning the nature and extent of the beneficial interest in water held by federal contractors under the Reclamation Program.

Furthermore, the court of appeals has misapplied the doctrine of mistakability by failing to follow this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839

(1996). The court of appeals blurred the line between Reclamation's proper exercise of sovereign authority and its proprietary role as a party to a contract.

REASONS FOR GRANTING THE WRIT

I. THIS CASE HAS BROAD IMPLICATIONS AFFECTING THE PROPERTY INTEREST OF FEDERAL RECLAMATION CONTRACTORS THROUGHOUT THE WESTERN UNITED STATES

Ninety-seven years ago, Congress initiated a program by enacting the National Reclamation Act of 1902, 32 Stat. 388 (codified at 43 U.S.C. § 372 *et seq.* (1902)) which forever changed the western United States. It was the final expansion of our Nation into the lands beyond the hundredth meridian of longitude.

The participants in this expansion faced many challenges. Unlike the eastern United States, much of the land was so arid that irrigation was an absolute necessity to grow crops. Thus, to entice the settlement, reclamation, and economic development of that arid portion of the American West, for the recognized benefits to the United States, Congress devised a federal program to make water available through the construction of large-scale water projects.

The goals of the federal reclamation program were best summarized by one of its most vigorous advocates, President Theodore Roosevelt:

> The Reclamation and settlement of the arid lands will enrich every portion of our country,

> just as the settlement of the Ohio and Mississippi Valleys brought prosperity to the Atlantic states. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which otherwise would not come into existence at all. Our people as a whole will prosper, for successful home-making is but another name for the upbuilding of the nation.[2]

The Central Valley Project in California is the largest of the reclamation projects authorized by Congress. This gigantic undertaking was developed to redistribute the water resources of California. "It was born in the minds of far-seeing Californians in their endeavor to bring the State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 280 (1957).

The two parallel ranges of mountains that run south from California's northern border for two-thirds the length of the State form the Central Valley Basin. The Sierra Nevada Mountain Range lies to the east and the Coast Range lies to the west. They converge in the north at Mount Shasta and are joined by the Tehachapi Mountains to the south. The Sacramento River forms at the

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[2] Message to Congress of December 3, 1901, Reprinted at Congressional Record – House, May 5, 1982 at 1837 (Remarks by Representative Pashayan).

headwaters near Mount Shasta and flows approximately 400 miles south into the San Francisco Bay. The San Joaquin River rises in the south and joins the Sacramento River in the Sacramento-San Joaquin Delta.

The CVP was built around these two rivers. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-229 (1949) for a full description of the CVP. The water storage and delivery system of the CVP covers 35 of the State's 58 counties. It includes 20 reservoirs, with a combined storage capacity of approximately 11 million acre-feet; 8 power plants; 2 pumping plants; and approximately 500 miles of major canals and aqueducts.

The CVP supplies water to more than 250 long-term water contractors in the Central Valley, the Santa Clara Valley and the San Francisco Bay Area. Total annual contracts exceed 9 million acre-feet of water.

Most CVPWA member entities have entered into long-term repayment or water service contracts with the United States through Reclamation pursuant to the Reclamation Project Act of 1939, 53 Stat. 1187 (codified at 43 U.S.C. § 485 *et seq.* (1939).) The remaining members have entered into exchange or water right settlement contracts with Reclamation[3]. Most of the member entities' contracts contain provisions similar to those of the contractors in this case.[4]

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[3] These contracts, in essence, recognize the prior vested, state-granted water rights of those specific contractors.

[4] Many of the long-term water service contracts for CVP water have expired. Pursuant to the Project Act of 1956, 70 Stat. 483 (July 2, 1956), codified at 43 U.S.C. § 485h-4 and the express

For instance, the long-term water service contract between the United States and Orange Cove Irrigation District states at Article 10 (a):

> In its operations of the Project, the United States will use all reasonable means to guard against a condition of shortage in the quantity of water to be made available to the Contractor pursuant to this contract. Insofar as determined by the Contracting Officer to be practicable the United States will, in the event a shortage appears probable, notify the Contractor of such determinations as soon as possible. Nevertheless, if there is a reduction in the total water supply available to the Contractor during any year, because of drought or other unavoidable causes, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.

The Ninth Circuit Court of Appeals' decision advances significant legal precedent potentially much broader in its impact than the specific facts of the case. In California, there are striking similarities to what has

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terms of the contracts, water users have a first right to renew their contracts. Because of the limitations and directives contained in the CVPIA, upon expiration of their long-term CVP contracts, contractors entered into "interim" contracts that serve as placeholders until new long-term contracts can be negotiated and executed. Reclamation is expected to begin negotiation of renewal of long-term water service and repayment contracts later this year. Review of this case may clarify significant outstanding issues regarding the nature and extent of the federal reclamation contractors' property interest in water acquired under the original contracts thereby facilitating the negotiation process for hundreds of federal reclamation contractors.

occurred in Arizona. The Secretary of the Interior, through Reclamation, is making important water operation and management decisions affecting hundreds of federal reclamation contractors. Instead of integrating omitted Indian water rights into Central Arizona Project contract administration, as was the case in Arizona, the Secretary in the CVP California situation has unilaterally reallocated water from its contracted uses to the new uses for environmental purposes. Whether in Arizona or California, the result is the same, federal contractors are being denied critical water deliveries. They alone are bearing the burden of inadequate water supplies despite having vested property rights in the water being reallocated. If the court of appeals' decision is left as it stands, the government will be relieved of its contractual obligation and absolved of any liability.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 575, 106 Stat. 4706, §§ 3401-3412 (1992). Among its many purposes, the CVPIA specifically dedicated 800,000 acre-feet of project yield for implementing the fish, wildlife and habitat restoration purposes authorized by the act; to assist California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta; and to meet obligations imposed on the project under the federal Endangered Species Act (ESA). CVPIA § 3406(b)(2). Additional water was also dedicated in the CVPIA to restore flows in the Trinity River and to provide a firm supply of water for habitat in the National Wildlife Refuge System in the Central Valley of California. CVPIA § 3406(b)(23) and CVPIA § 3406(d).

Using the water specifically allocated by Congress and water acquired through purchase, lease or by options on water, the Secretary was also authorized to provide flows to protect and enhance California's fishery resources; provided, however, that the use of water from these other sources did not conflict with the Secretary's ability to fulfill its contractual obligations to provide CVP water for other authorized purposes. CVPIA § 3406(b)(1)(B).

There are parallels between the San Carlos Apache Tribe Water Rights Settlement Act and the CVPIA, in that both have been used by the Secretary to effect a reallocation of water. In the case of the CVPIA, the reallocation of water has been exacerbated by the manner in which Reclamation has operated the CVP. Even though the last several years have been among the wettest years on record, in some of those years federal reclamation contractors have received only a portion of the water they hold under contract. Unless the Secretary is constrained to exercise balance and restraint, the federal reclamation contractors will continue to be significantly affected.

The decision of the court of appeals encourages the Secretary of the Interior to act as if he has unfettered discretion to unilaterally modify contractual obligations. The decision potentially impacts all federal reclamation contractors, not simply the non-Indian agricultural users of the Central Arizona Project. If not held to an even-handed balanced exercise of discretion, Reclamation will be encouraged to snuff out the property rights held by those same contractors. The decision also undermines the certainty of a water supply that is essential to the continued economic prosperity of the western United States.

In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, this Court deferred answering the question of title to reclamation facilities on the assumption that it was "highly improbable" that Congress or the government would trample on the property rights of the federal reclamation contractors. As noted by this Court, it did not seem untoward that the people who benefited so greatly from the construction of these projects should "depend in small measure" on the beneficence of the government.

> [I]t seems farfetched to foresee the Federal Government "turning its back upon a people who had been benefited by it" and allowing their lands to revert to desert. The prospect is too improbable to figure in our decision.

Id. at 299-300.

Despite how farfetched it may have seemed to this Court in 1957, the court of appeals, by misconstruing the protected property interests of the federal reclamation contractors, has concluded that the government is, in fact, not bound by the promises earlier made.

II. CONTRARY TO DECADES OF THIS COURT'S OPINIONS, THE COURT OF APPEALS' DECISION APPEARS TO HAVE ABOLISHED FEDERAL RECLAMATION CONTRACTORS' PROTECTED PROPERTY INTEREST IN THE WATER

The court of appeals overlooked fundamental reclamation law when it determined that the districts did not have a protectable property interest pursuant to their federal reclamation contracts. In reaching its conclusion, the court of appeals ignored numerous decisions by this

Court upholding the vested rights of federal contractors in water diverted and distributed by Reclamation.

A fundamental tenet of reclamation law is found in section 8 of the Reclamation Act of 1902. It states, in pertinent part, that "[t]he right to the use of water acquired under this provision of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Time and again, this Court has construed section 8 to mean that the rights to water provided by Reclamation are the property of the landowners who put that water to beneficial use.

The question of beneficial ownership of water rights acquired for the operation of projects constructed by Reclamation was first addressed by this Court in *Ickes v. Fox*, 300 U.S. 82 (1937). Although the Court acknowledged the government's role in diverting, storing and distributing the water, the Court concluded that such appropriations were not made for the use of the government. Those diversions were made for the use of the landowners. "[T]he water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Id.* at 95.

The Court went on to explain that Congress by the Desert Land Act of 1877, 19 Stat. 377 (codified at 43 U.S.C. § 321, *et seq.*), severed the land and water constituting the public domain and established the rule that lands should be patented separately from the water. The water was reserved for the use of the public under the laws of the various states. The Court recognized that the various states having reclamation projects had long established

laws pertaining to the acquisition of water. Under those laws, the right to use water could only be acquired through beneficial use. Once acquired, the right to use the water appropriated is a vested property right. Thus, the Court concluded that landowners receiving water from Reclamation obtained a property right in the water by state law and "by express provision of the Reclamation Act as well." *Ickes v. Fox*, 300 U.S. at 95-96.

Again this Court took up the issue of ownership of water developed by Reclamation in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In that case, Reclamation claimed ownership of all unappropriated water in the Platte River. In rejecting the argument of the United States, this Court went on to address the nature and extent of the rights acquired by Reclamation when it developed the North Platte Project and the Kendrick Project.

Relying on section 8 of the Reclamation Act of 1902, and its previous decision in *Ickes v. Fox*, this Court reiterated its finding that the landowners hold vested property rights in the water contracted for with the United States.

> The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.
>
> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual

> diversion followed by an application within a reasonable time of the water to a beneficial use. Indeed § 8 of the Reclamation Act provides as we have seen that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Nebraska v. Wyoming, 325 U.S. at 614, internal citations and quotations omitted.

More recently, this Court took up the question in *United States v. Nevada*, 463 U.S. 110 (1983). In that case, the decision of the court of appeals permitted a reallocation of water decreed in the Orr Ditch by Reclamation from irrigation to the Pyramid Indians. In overruling the court of appeals, this Court clearly stated that if it allowed the decision to stand, it would be striking out half a century of decided case law relating to the Reclamation Act of 1902 and the water rights in the public domain of the West.

After summarizing its previous decisions in *Ickes v. Fox* and *Nebraska v. Wyoming*, the Court went on to state that the law of Nevada was common to most other western States. To perfect a water right, the water must be beneficially used by actual application of the water on the land. The water right is appurtenant to the land on which it is used. *United States v. Nevada*, 463 U.S. at 125.

Emphasizing its unfaltering position, the Court chastised Reclamation, stating:

> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in irrigating

> lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Id.

Finding that the government's "ownership" of water rights was at best "nominal," the Court reiterated that beneficial interest in the water rights resides in the owners of the land within the project. Once project water is applied, the water rights become appurtenant to the land. Reclamation law, the federal reclamation contracts and previous case law make that finding evident.

The court of appeals completely ignored almost a century of well-established reclamation law by concluding the districts do not have a protectable property interest under their federal reclamation contracts. The court of appeals should not be allowed to abolish what this Court has repeatedly found to be the vested property interests of federal reclamation contractors.

III. THE COURT OF APPEALS IGNORED THIS COURT'S DECISION IN *UNITED STATES v. WINSTAR* BY MISAPPLYING THE DOCTRINE OF UNMISTAKABILITY

At a time when the public may have lost faith in its government, the decision by the court of appeals seems only to confirm the widely held notion that, indeed, the United States is an unreliable contracting partner. This Court has the opportunity to bolster the government's credibility and, in fact, its very ability to contract by reviewing the Ninth Circuit's faulty reasoning.

In reaching its decision, the court of appeals overlooked entirely this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) by misapplying the doctrine of unmistakability. Without carefully examining the contracts at hand, or the relief sought, the court of appeals simply assumed that the districts were attempting to limit the exercise of sovereign power. Nothing could be further from the truth.

Federal water contractors in California do not take issue with Congress' ability to exercise its sovereign authority by enacting such legislation as the Endangered Species Act or the Central Valley Project Improvement Act. These statutes, if properly implemented, provide ample procedural safeguards for contractors to protect their proprietary interests in CVP water. Reclamation, however, has improperly blurred the sovereign exercise of power with the free-wheeling exercise of its proprietary authority in administering these contracts. In its role as a party to a contract it is not free to unilaterally operate the CVP and reallocate water otherwise under contract in anticipation of what may be required under the ESA or the CVPIA. This type of manipulation of project operation and water allocation circumvents the safeguards that would otherwise come into play if Reclamation properly separated its sovereign hat from its proprietary hat. Increasingly, over the past eight or nine years, Reclamation has, through this type of improper reoperation and reallocation, diminished and taken the valuable water rights relied upon historically by CVP contractors and the individuals and entities that they serve. This impermissible behavior not only adversely affects the lives of real people and real business but also

undermines the entire historic and legal rationale the underpins the reclamation program upon which much of the west depends.

The question of who bears the financial risk associated with these water shortages is timely. The mischief of the court of appeals' decision is permitting Reclamation to shift the public's burden of providing water to meet additional demands onto its contractual partners as a discretionary act ignoring the constraint of its existing contracts, and without consequence. That holding is directly contrary to this Court's decision in *Winstar. United States v. Winstar Corp.*, 518 U.S. at 882.

There is no doubt that Congress can change federal policy but that change of policy is not written on a blank slate. "Lives, families, businesses, and towns are built on the basis of the old policies." *Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1400 (1993). The Fifth Amendment of the United States Constitution protects expectations that are reasonably based on protected property rights against policy changes. *Id.*

In *United States v. Nevada*, this Court considered Reclamation's sometimes conflicting obligations to provide water to both the Newlands Project and the Pyramid Lake Indian Reservation. Acknowledging that Congress was requiring the Secretary to fulfill the difficult task of carrying water on at least two shoulders, this Court affirmed the government's obligation to perform its responsibility without compromise to both interests. 463 U.S. at 127.

When the government finds itself unable to perform its obligations to meet the contractual entitlements of its

federal reclamation contractors,[5] then it should be required to bear the financial risk. It is the government, not the federal reclamation contractors, that must assume the cost of a change in federal policy. That is the result required by this Court's decision in *Winstar*.

Recognition of federal reclamation contractors' property interest in water is not tantamount to a surrender of sovereign authority. Nor is the payment of damages for water shortages a surrender of sovereign power. The court of appeals was required to apply ordinary principles of contract law in accordance with this Court's decision in *Winstar*. *United States v. Winstar Corp.* at 881-882. Had it done so, the court of appeals would have concluded that the government's liability did not rest in the act of the government as the sovereign but in its role as a party to a contract. The sovereign can breach a contract without calling into question its sovereign authority.

Unless this case is reviewed, the court of appeals will expansively apply the unmistakability doctrine to the ultimate disadvantage of the government. As this Court noted in *Winstar*, the government needs to be an effective contracting partner.

> Injecting the opportunity for unmistakability litigation into every common contract action

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[5] Federal reclamation contractors do not seek to shield themselves from all financial risk associated with the shortage of water. When such shortages are truly a result of drought or emergencies beyond the control of Reclamation, it is appropriate for contractors to bear those costs. Furthermore, as a contracting party, Reclamation is free to negotiate contract provisions that spread the risk among the parties or that specify appropriate remedies for future changes in circumstances.

> would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be of the essence of sovereignty itself.

United States v. Winstar Corp., 518 U.S. at 884, citation and quotation omitted.

The court of appeals' decision undermines the government's credibility in all existing and future contracts under the Reclamation program and must be reviewed.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16PP

QUESTION PRESENTED

Whether petitioner irrigation districts were deprived of property without just compensation when Congress reallocated certain water, which it had earlier made available to the Central Arizona Project "on an interim basis" (Pub. L. No. 98-530, § 2(k), 98 Stat. 2701), to other uses.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546 (1963)	2
Central Ariz. Irrigation & Drainage Dist. v. *Lujan*, 764 F. Supp. 582 (D. Ariz. 1991)	3
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	10
United States v. *Winstar Corp.*, 518 U.S. 839 (1996)	11, 12
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)	12

Statutes:

Act of Oct. 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698:	
§ 2(a), 98 Stat. 2698	4
§ 2(b), 98 Stat. 2698	4
§ 2(f)(1), 98 Stat. 2699	4
§ 2(f)(2), 98 Stat. 2699	4
§ 2(k), 98 Stat. 2701	4, 5, 7, 9, 10
§ 8, 98 Stat. 2702	10
Boulder Canyon Project Act, 43 U.S.C. 617 *et seq.*:	
43 U.S.C. 617c	2
43 U.S.C. 617*l*(a)	2
Colorado River Basin Project Act, 43 U.S.C. 1501 *et seq.*:	
43 U.S.C. 1501-1556	2
43 U.S.C. 1521	2
43 U.S.C. 1521(b)	2

Statutes—Continued: Page

43 U.S.C. 1524 ..... 2, 3
San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, Tit. XXXVII, §§ 3701-3711, 106 Stat. 4740-4752 5
§ 3704(a), 106 Stat. 4742 5
§ 3708(f), 106 Stat. 4749 ..... 5, 6
28 U.S.C. 1292(b) 6

Miscellaneous:

45 Fed. Reg. 81,265 (1980) 3
48 Fed. Reg. 12,446 (1983) 3
57 Fed. Reg. (1992):
p. 4470 11
p. 4471 11
p. 4476 11

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 158 F.3d 428. The opinion of the district court (Pet. App. 23a-48a) is unreported. The order of the court of appeals granting interlocutory review (Pet. App. 22a) is unreported.

JURISDICTION

The court of appeals initially entered its judgment on July 7, 1998. Petitioners then filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals withdrew its original opinion and substituted a revised opinion on October 14, 1998. The petition for a writ of certiorari was filed on January 12,

1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By federal law and interstate compact, the right to use water from the Colorado River has been legally apportioned among the seven States through which the river and its tributaries pass: Wyoming, Colorado, Utah, Nevada, New Mexico, Arizona, and California. See generally *Arizona* v. *California*, 373 U.S. 546 (1963). In the Boulder Canyon Project Act of 1928, Congress allocated to Arizona water users 2.8 million acre-feet per year of the Colorado River's normal annual flow of approximately 15 million acre-feet. 43 U.S.C. 617c, 617*l*(a); see also *Arizona* v. *California*, 373 U.S. at 561, 565.

The distribution of most of that water within Arizona is governed by the Colorado River Basin Project Act of 1968, 43 U.S.C. 1501-1556, and Arizona law. The Basin Project Act authorized the Bureau of Reclamation, an agency within the United States Department of the Interior, to construct a 335-mile-long system of canals, siphons, pumping plants, and tunnels known as the Central Arizona Project (CAP). 43 U.S.C. 1521. The Act further authorized the Secretary of the Interior to contract for the repayment of CAP construction costs with a single political subdivision in Arizona, 43 U.S.C. 1524, and Arizona created the Central Arizona Water Conservation District (CAWCD) for that purpose. Not all Colorado River water used in Arizona is part of the CAP supply. When Congress authorized construction of the CAP, it required the Secretary to respect the rights of entities with preexisting, senior entitlements to Colorado River water within Arizona's allocation. See 43 U.S.C. 1521(b).

On December 15, 1972, the United States entered into a combined water service and repayment contract with the CAWCD. That so-called Master Contract provides for delivery by the United States of CAP water to various subcontractors and obligates the CAWCD to repay $1.2 billion in costs for the construction of the delivery facilities. Pet. App. 24a; *Central Ariz. Irrigation & Drainage Dist.* v. *Lujan*, 764 F. Supp. 582, 584-585 (D. Ariz. 1991).[1]

2. The Basin Project Act authorizes the Secretary to allocate Arizona's CAP water supply among categories of users within the State. 43 U.S.C. 1524.[2] In a March 1983 decision, see 48 Fed. Reg. 12,446, the Secretary allocated a total of 309,000 acre-feet per year to Arizona Indian Tribes, 640,000 acre-feet per year to "municipal and industrial" users, and the remainder of the CAP water to non-Indian agricultural users. Pet. App. 3a-4a & n.3. The Secretary determined, and petitioners do not now contest, that, during water shortages, Indians and "municipal and industrial" users take priority over non-Indian agricultural users. *Ibid.* Within the 309,000 acre-feet allocated to the Indian Tribes, the Secretary included a specific contractual obligation to provide 58,300 acre-feet of water each year to the Ak-Chin Tribe. *Id.* at 6a.

Shortly after the allocation decision, the Secretary and the CAWCD entered into separate contractual

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[1] The 1972 Master Repayment Contract was amended in 1988. All references to the Master Repayment Contract in this brief are to the amended contract. The provisions relevant to this case are materially the same in each contract.

[2] An allocation "is an offer to contract." 45 Fed. Reg. 81,265 (1980). It does not commit the Secretary to deliver water. Water delivery is based on a party's specific contract. *Ibid.*; see also Pet. App. 4a.

agreements with each of the petitioners in this case, which are Arizona irrigation districts involved in the provision of CAP water to non-Indian agricultural concerns. Those agreements entitled petitioners and other non-Indian agricultural users to a percentage of the "CAP residual pool," which is the portion of CAP water not allocated to Indian Tribes or to "municipal or industrial" users. Petitioners agreed to reimburse the federal government for the cost of constructing the facilities that deliver CAP water to them. Pet. App. 4a-5a.

In the Ak-Chin Settlement Act of 1984 (Ak-Chin Act), which was enacted after the Secretary's 1983 allocation decision and after the Secretary had entered into the contracts at issue here, Congress augmented the Ak-Chin's water rights to a general entitlement of between 75,000 and 85,000 acre-feet of water per year, depending on availability. See Act of Oct. 19, 1984, Pub. L. No. 98-530, § 2(a),(b), and (k), 98 Stat. 2698-2701 (Pet. App. 55a-57a). That water is to come from two sources, one within the CAP and one outside it. See Pet. App. 5a-6a & n.7. Under subsection 2(f)(1) of the Ak-Chin Act, the Secretary is first required to give the Ak-Chin Tribe 50,000 acre-feet of water previously assigned to the Yuma-Mesa Division of the Gila Project, 98 Stat. 2699, which has never been part of the CAP and which has a priority date superior to the CAP's. See Pet. App. 5a n.7. Under subsection 2(f)(2), the Secretary must then supply the Ak-Chin Tribe with whatever portion of its previous 58,300 acre-foot allotment of CAP water is necessary to meet the Tribe's new total entitlement (75,000 to 85,000 acre-feet) under the Act. 98 Stat. 2699.

The remainder of that previous 58,300 acre-foot allotment of CAP water described in Subsection 2(f)(2)

of the Ak-Chin Act—known as the "excess Ak-Chin" water, and constituting roughly 23,000 to 33,000 acre-feet per year—is the subject of this litigation. The Ak-Chin Act specified that "the Secretary shall allocate on an interim basis to the [CAP] any of the water referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act." § 2(k), 98 Stat. 2701. For eight years, that "interim" arrangement made additional water available to petitioners, which take water from the CAP residual pool. The arrangement ended, however, with the enactment of the San Carlos Apache Tribe Water Rights Settlement Act of 1992 (SCAT Act), Pub. L. No. 102-575, Tit. XXXVII, §§ 3701-3711, 106 Stat. 4740-4752. In Section 3704(a) of the SCAT Act, Congress provided that "[t]he Secretary shall reallocate, for the exclusive use of the [San Carlos Apache] Tribe, all of the water referred to in [Subsection 2(f)(2) of the Ak-Chin Act], which is not required for delivery to the Ak-Chin Indian Reservation under the Act." 106 Stat. 4742.

Petitioners asserted a property interest in the Ak-Chin Act's "interim" allocation of the excess Ak-Chin water to the CAP, and they claimed that the SCAT Act had unlawfully terminated that interest without just compensation. Although Congress did not accept that contention, it created a special jurisdictional provision to ensure efficient disposition of the claim in federal district court. Section 3708(f) of the SCAT Act confers jurisdiction on the district court in Arizona (and concurrent jurisdiction on the United States Claims Court, now the United States Court of Federal Claims) "to hear and decide any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water," and defines "claim" to mean "a claim that the reallocation of water to the Tribe pur-

suant to section 3704(a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water." 106 Stat. 4749.

3. The district court granted summary judgment to petitioners on the issue of liability. Pet. App. 23a-48a. After first affirming its jurisdiction over the case (*id.* at 32a-34a), the district court held that the SCAT Act's assignment of water to the San Carlos Apache Tribe deprived petitioners of a constitutionally protected property interest in the excess Ak-Chin water. The court reasoned that, under the 1983 contracts between petitioners and the Secretary, the excess Ak-Chin water could not be used to augment the water rights of Indians or municipal and industrial users because it had been irrevocably committed to the CAP residual pool. *Id.* at 35a-47a. The court then scheduled a hearing to discuss calculation of damages. *Id.* at 48a.

4. The United States filed an interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed. Pet. App. 1a- 21a. After rejecting a jurisdictional challenge raised by several amici curiae (see *id.* at 8a-12a), the court turned to the merits. The court observed that petitioners could assert a compensable taking only if they could show a protected property right to the excess Ak-Chin water. Although petitioners assert such a right, the court explained, their claim presupposes that allocation of water to the CAP "rather than to a specific user or user class automatically and irrevocably would allocate that water to the non-Indian agricultural pool." *Id.* at 13a. The court rejected that premise as inconsistent both with the Ak-Chin Act itself (*id.* at 13a-17a) and with the government's consistent practice of treating the excess Ak-

Chin water "as remaining in the Indian priority pool" (*id.* at 17a n.16) even before passage of the SCAT Act.

The court alternatively held that, even if the Ak-Chin Act could be construed to give petitioners individual interests in the excess Ak-Chin water, they could not claim an "enduring property right unless that interest rose to the level of an entitlement" that was immune from reallocation. Pet. App. 17a-18a. Petitioners have no such entitlement here, the court concluded, because the Ak-Chin Act itself directed the Secretary to allocate the excess Ak-Chin water to the CAP only "on an *interim* basis." *Id.* at 19a (quoting § 2(k), 98 Stat. 2701).

ARGUMENT

Although petitioners mistakenly contend (Pet. 14-16) that this dispute has broad implications for water rights throughout the Southwest, the dispute is in fact confined to the excess Ak-Chin water reallocated in the SCAT Act, and its proper resolution is governed by several narrow provisions specific to that water. The court of appeals' construction of those provisions is correct, and the case warrants no further review.

1. Petitioners claim a right under their 1983 contracts to a fixed share of the extra 23,000 to 33,000 acre-feet per year of undesignated CAP water that the Ak-Chin Act made available in 1984. That claim rests on two premises: first, that the Ak-Chin Act *irrevocably* committed that water to the CAP; and, second, that the 1983 contracts bound the Secretary to give petitioners a fixed share of that extra water. Each of those premises is independently essential to petitioners' claim, and each is false.

a. First, there is no merit to petitioners' contention that the Ak-Chin Act irrevocably committed the water at issue to the CAP.

By allocating 50,000 acre-feet of Yuma-Mesa water per year to the Ak-Chin Tribe, the Ak-Chin Act had the provisional effect of increasing the amount of undesignated CAP water by substantially decreasing the previous allocation of CAP water to the Ak-Chin. See Pet. App. 5a-6a & n.7. As the court of appeals determined, that Yuma-Mesa water has always been separate from the CAP. See *ibid.* That factbound determination—which petitioners question but do not directly challenge here (see Pet. 8, 21-23), and which in any event would not warrant this Court's review—is significant for purposes of this case. Because the Yuma-Mesa water entered the equation only after petitioners had entered into their 1983 contracts, the SCAT Act's reallocation of the excess Ak-Chin water to other Indian users did not make petitioners worse off than they would have been under those contracts if Congress had not subsequently enacted the relevant provisions of either the Ak-Chin Act or the SCAT Act.[3]

In alleging a right to have all excess Ak-Chin water allocated to the CAP, therefore, petitioners must rely on the Ak-Chin Act itself, which created that excess water category to begin with, rather than on their contracts with the Secretary, which preceded the Act. By its terms, however, the Ak-Chin Act forecloses, rather than supports, petitioners' claim to an "irrevocabl[e]" (Pet. 24) property interest in that water.

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[3] Petitioners' characterization of the Ak-Chin Act as a "compromise" designed to resolve a dispute about the status of the Yuma-Mesa water (see Pet. 21-25) would not help their position here even if that characterization were accurate. As discussed in the text, any benefits petitioners could claim to have derived from the Ak-Chin Act were explicitly "interim" in character. "Interim" benefits are "interim" whether or not they are part of a "compromise."

Section 2(k) of the Act provides that the extra water shall be "allocate[d] on an *interim* basis to the Central Arizona Project." 98 Stat. 2701 (emphasis added). As the court of appeals explained (Pet. App. 19a-20a), when Congress allocates water rights on an "interim" basis, it may reallocate those rights in later legislation without incurring a constitutional obligation to pay just compensation. Analogously, the government may grant temporary permits to people without thereby obligating itself to compensate them when it needs to revoke those permits.[4]

Without citing relevant authority, petitioners contend that "interim" is a term of art "[i]n the context of western water law" and that here the term confirms only that the Ak-Chin retain senior rights to a portion of the original CAP water that had been allocated to the Tribe before passage of the Act. Pet. 25 n.18. That reading, however, not only defies the plain meaning of the term "interim" (which means "not permanent"), but also deprives it of any independent significance in the Ak-Chin Act. Section 2(k) itself separately makes clear that the "interim" allocation of Ak-Chin water to the CAP is appropriate only when the amount taken "is *not* required for delivery to the Ak-Chin Indian Reservation"—*i.e.*, only when it "*exceeds* the quantity necessary to meet the [Secretary's] obligations" to the Ak-Chin. 98 Stat. 2701 (emphasis added). Under petitioners'

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[4] The combined effect of the Ak-Chin Act and the SCAT Act is essentially the same as if Congress had simply provided in a single Act for the Ak-Chin Tribe to assign a portion of its high-priority CAP water right directly to the San Carlos Apache Tribe, an approach that clearly would not have violated any rights of petitioners. The fact that Congress accomplished that result in two Acts rather than one, and allocated excess water to the CAP during the "interim," does not change the constitutional analysis.

construction, Congress's inclusion of the term "interim" would have added nothing to the rest of the provision. Finally, if there were any ambiguity on the meaning of Congress's "interim" allocation, which there is not, the Secretary's interpretation would be entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

b. The explicitly interim character of Section 2(k) of the Ak-Chin Act is itself a sufficient basis for rejecting petitioners' claim. Even if the Ak-Chin Act's allocation of excess Ak-Chin water to the CAP had been permanent and irrevocable, however, petitioners' claim would be invalid for an independent reason as well: Neither the 1983 allocation decision nor the 1983 contracts compelled the Secretary to allocate a fixed share of the excess Ak-Chin water to petitioners.

Based on its reading of the record, the court of appeals correctly held that "post-1983 allocations to the CAP do not fall to a particular user or user class, but remain at the Secretary's discretionary disposal, because the users' allotments were predicated on the amount of water in the CAP in 1983." Pet. App. 16a-17a.[5] That factbound determination warrants no further review. Petitioners' contrary position is particularly problematic here, because, as the court of appeals observed, "the Secretary never treated [petitioners] as having automatic access to this or any other

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[5] As the court of appeals explained, petitioners are incorrect in claiming that the Ak-Chin Act divested the Secretary of that discretion. See Pet. App. 17a-19a. Indeed, Section 8 of the Act itself provided that "[n]othing in this Act shall be construed to enlarge or diminish the authority of the Secretary with regard to the Colorado River." 98 Stat. 2702; see Pet. App. 19a n.19.

water allocated to the 'Central Arizona Project.' Quite to the contrary, the Secretary publicly treated the excess Ak-Chin water as remaining in the Indian priority pool between the Ak-Chin Settlement and the SCAT Acts." *Id.* at 17a n.16 (citing 57 Fed. Reg. 4470, 4476 (1992)); see also Master Repayment Contract, ¶ 8.7 (Appellant's E.R. 149) (addressing Secretary's discretion to protect Indian water rights); cf. 57 Fed. Reg. at 4471 (Pet. App. 80a) (amounts of water for non-Indian agricultural users "are expected to decrease during the project life as the [municipal and industrial] use increases").[6]

2. Petitioners contend that the decision below conflicts with *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), which addressed the "unmistakability" doctrine in government contract law, and they criticize the court of appeals for not citing *Winstar* in its opinion. See, *e.g.*, Pet. 13, 28. As an initial matter, petitioners themselves never cited *Winstar* either in their merits brief in the court of appeals or in their petition for

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[6] In ¶ 8.12 of the Master Contract, the parties agreed that the United States would be immune from liability "for any damages * * * arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever." Pet. App. 95a; Appellant's E.R. 158. Petitioners contend that the court of appeals construed that provision to "give[] the Secretary *carte blanche* to relieve the government of any liability—or any actual obligations—under its water supply contracts." Pet. 20. That is incorrect. The court of appeals never even explicitly cited that provision; while the court did allude to ¶ 8.12 in passing, it did so only to support the proposition that the Ak-Chin Act did not limit Congress's power to reallocate the water at issue. Pet. App. 20a. This case therefore presents no issue concerning the full scope of ¶ 8.12.

rehearing. Even if this case could somehow be said to involve a *Winstar* issue, this Court does not ordinarily grant certiorari to review questions that were neither raised in nor addressed by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993).

In any event, no *Winstar* issue is properly presented here to begin with.[7] Recourse to the unmistakability doctrine is of course unnecessary where, as here, a plaintiff has no valid claim against the government under ordinary legal principles. Here the court of appeals needed to rely only on such ordinary principles to determine that, in allocating the excess Ak-Chin water to the CAP "on an interim basis," the government had preserved its authority to reallocate that water later; indeed, the court concluded, petitioners' contrary position is "unthinkable" even on its own terms. Pet. App. 20a. It follows *a fortiori*, the court added, that the United States did not "unmistakably" render itself liable to petitioners' "unthinkable" claim. That statement, however, related at most to an alternative holding, see Pet. App. 18a-19a, 20a-21a, and it warrants no further review.

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[7] Five Justices in *Winstar* disagreed with the plurality's conclusion that the "unmistakability" doctrine was inapplicable on the facts of that case. See 518 U.S. at 919-924 (Scalia, J., concurring in the judgment); *id.* at 924-937 (Rehnquist, C.J., dissenting). *Winstar* therefore does not support a claim that that doctrine is inapplicable in a particular context, although it does of course address the extent to which that doctrine materially affects the outcome of specific cases. See *id.* at 920-922 (Scalia, J., concurring in the judgment). The governmental obligations alleged in this case have virtually nothing in common with the obligations at issue in *Winstar* itself, which involved regulation of financial institutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; NEW MAGMA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO CERTIORARI

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1199

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES **Page**

United States v. Winstar,
518 U.S. 839 (1996) 2-4

LEGISLATIVE HISTORY

130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) 6

STATUTES

Ak-Chin Settlement Act of 1984, Pub. L. No. 98-530,
98 Stat. 2698 (Oct. 19, 1984) ..... *passim*

Boulder Canyon Project Act of 1928 ..... 1, 7
§ 5, 43 U.S.C. § 617d 1

San Carlos Apache Tribe Water Rights Settlement
Act of 1992, Pub. L. No. 102-575,
106 Stat. 4740 (Oct. 30, 1992) 1, 3

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1. In their Petition, the three Arizona irrigation districts showed that certiorari should be granted because this case involves issues of great significance concerning the Secretary of the Interior's allocation authority under the Boulder Canyon Project Act of 1928 ("BCPA"). The court of appeals held that the Secretary, exercising his authority under § 5 of the BCPA in accordance with the direction provided in the San Carlos Apache Tribe Water Rights Settlement Act ("SCAT Act"), was free to allocate to the San Carlos Apache

a significant quantity of water that he had previously allocated "to the Central Arizona Project" ("CAP") as directed in the Ak-Chin Settlement Act of 1984. This water, allocated to the CAP and thus already subject to the CAP's allocation and contractual structure, was explicitly subjected to the Districts' contracts in a subsequent amendment to the Secretary's Master Repayment Contract with the Central Arizona Water Conservation District ("CAWCD") in 1988. See Pet. at 2-13, 1a-21a, 57a, 94a. The Districts thus showed in their petition that the court of appeals' decision enables the Secretary to resolve the numerous water rights disputes currently brewing in the West with water currently allocated to and contracted for by others, and thereby casts into jeopardy the value of the hundreds of existing water supply and delivery contracts to which the Secretary is party. See Pet. at 14-21.

The Districts further showed that the court of appeals applied the "unmistakability doctrine" in denying their contractual claims to the water at issue here in a manner that directly conflicts with this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996), and creates a harmful precedent with far reaching implications for western water law, if not government contract law generally. See Pet. at 26-29.

The importance of this case is underscored by the brief in support of certiorari filed by the *amicus*, a California association of local government agencies and public utilities who are concerned about the impact of the court of appeals' decision on their own contracts with the Secretary.

The government's brief in opposition does not try to refute the Districts' showings on these issues. With respect to the impact on the Secretary's allocation authority and Western water contracts generally, the government simply denies -- in

a single, unsupported sentence -- that this case will have any "broad implications." Opp. at 7. As discussed in the Districts' petition, however, even if the impact of the dispute were "confined to the excess Ak-Chin water reallocated in the SCAT Act," as the government contends, Opp. at 7, it would nevertheless be a matter worthy of this Court's attention: the reallocation of the excess Ak-Chin water deprived all non-Indian users of water from the CAP -- the principal source of reclamation and development in Central Arizona -- of 23,000-33,000 acre feet of water in most years, thereby directly or indirectly impacting hundreds of thousands of people. And, given the court of appeals' broad statements regarding the Secretary's allocation authority, the decision will inevitably have a far broader impact than that. See Pet. at 14-21.

With respect to the conflict with *Winstar*, the government simply asserts that "no *Winstar* issue is properly presented here," because "the court of appeals needed to rely only on . . . ordinary [legal] principles" in its decision. Opp. at 12. This, of course, is precisely the point: under *Winstar*, the court of appeals *should have* relied "only on . . . ordinary principles," under which the district court held that the Districts' contracts indeed afford them the rights they assert in this case. It was the court of appeals' decision to apply instead an "unmistakability" analysis to these ordinary contract claims that contributed to its erroneous decision, caused the conflict with *Winstar*, and created the precedent the Districts ask this Court to correct.[1]

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[1]The government suggests that the *Winstar* issue is not reviewable because the Districts did not cite that case in their briefs to the court of appeals. This is hardly surprising, as the Districts do not believe the "unmistakability doctrine" is applicable to their contracts, and the government never suggested otherwise. The district court, of course, did not apply the doctrine, nor was it apparent from its initial opinion, from which the Districts sought rehearing, that the court of appeals had applied it.

As set forth in the Districts' petition, then, this case is deserving of this Court's attention.

2. Rather than addressing the importance of the issues presented by this case, the government attempts to convince this Court that the Districts' petition should be denied because the court of appeals "correctly" reversed the district court. Opp. at 7-11. In this regard, the government principally contends that the Districts can have no enduring right to the water at issue here because of the word "interim" in the Ak-Chin Settlement Act. The government's interpretation of "interim," however, ignores the Secretary's use of that term, the legislative history of the Ak-Chin Settlement Act, and the contractual provisions implementing that Act. Secondarily, the government asserts that even if the water relinquished by the Ak-Chin in the Ak-Chin Settlement Act were irrevocably committed to the CAP, the Districts would not be entitled to that water. Both of these arguments are without merit as demonstrated below.

a. First, contrary to the government's assertions, and as the district court in this case recognized, the language of the Ak-Chin Settlement Act indeed committed the Secretary to allocate to the CAP any of the original Ak-Chin allocation not needed for delivery to the Ak-Chin in any given year. Thus, the Act provides: "*[W]henever* the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary *shall allocate* [any excess water] on an interim basis to the Central Arizona Project." Pet. at 57a (emphasis added). In other words, in any (and every) year in which the water referenced in subsection (f) exceeds the 75,000-85,000

Rather, the "unmistakability doctrine" and the *Winstar* conflict appeared for the first time at the Ninth Circuit's initiative, in its October 14, 1998 decision.

acre-feet to which the Ak-Chin are entitled, the Secretary must make that excess water available to the CAP.

These allocations, however, would be on "an interim basis." That is, simply because a given quantity is available and allocated in one year does not mean that an equal quantity of water -- or indeed any water -- will be available and allocated the next year. As the Districts explained in their petition, the term "interim" is used in the context of western water allocations and water rights in just this sense, to reflect the contingent nature of these rights. Pet. at 25 n.18.[2] The Secretary himself repeatedly used the term in precisely that fashion in his 1983 Allocation Decision: the Secretary "will retain the right to contract for water sales on an interim basis where Indian water allottees are not utilizing the full CAP allotment as provided herein." See Pet. at 64a, 71a-72a, 72a. The Secretary then exercised this retained authority by contracting with the Districts and other non-Indian agricultural users to provide to them -- on an interim basis -- any of the Indian or municipal and industrial allocations not actually used by those allottees in a particular year. See Pet. at 80a ("Non-Indian agricultural water users are expected to contract for and receive water available from the CAP facilities which is not being utilized in the early years by the M&I and Indian contractors."); Pet. at 88a-91a, 94a-95a.[3]

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[2]The principle inherent in the term reflects the linchpin of western "prior appropriation" water allocation systems, under which a water user with rights junior to other users from the same source has a protected right to use senior unused water on an interim, nonpermanent basis if it is not being put to use by the senior users.

[3]Contrary to the government's suggestion, see Opp. at 3, 11, there is no "Indian pool" of water: the CAP water is available to each specific Tribe and municipal and industrial user in accordance with the Secretary's allocations, with all unused water annually available to the non-Indian agricultural pool. Pet. at 80a, 88a-91a, 94a-95a.

That the word "interim" is used in this same sense in the Ak-Chin Settlement Act is confirmed by the legislative history of the provision. According to Senator DeConcini, the drafter and sponsor of the relevant provision, the "amendment clarifies . . . that any water that is not utilized by the Ak-Chin community will revert to the State for use by its CAP customers." 130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) (see Pet. at 22 & n.15). There is no suggestion that Senator DeConcini intended the Secretary's allocation to the CAP to be temporary or revocable. Rather, without the word "interim," the Ak-Chin Settlement Act would be ambiguous, and could be interpreted to mean that at such time as ("whenever") a quantity of the original Ak-Chin allocation became available, it would have to be permanently allocated to the CAP, regardless of whether it was needed in some later year to satisfy the Ak-Chin's entitlement. This, of course, is not what Congress intended. In the language used by the Secretary himself in the 1983 CAP Allocation Decision, then, Congress specified that allocations of excess Ak-Chin water to the CAP would occur on an "interim" basis.

In addition, of course, even if the Ak-Chin Settlement Act of 1984 had left the Secretary free to permanently remove the excess Ak-Chin water from the CAP, in 1988 the Secretary amended the Master Repayment Contract with the CAWCD to explicitly include the excess Ak-Chin water among the "project water" required to be delivered to Arizona non-Indian users. Pet. at 94a ("'Project Water' shall mean . . . (d) any additional water . . . that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act . . . ."). This contractual provision, which the government simply ignores in its opposition, removes any doubt there may have been regarding the permanency of the Districts' right to receive the water, on an

"interim" basis, in any year it is not needed for delivery to a higher priority user. Pet. at 94a.[4]

b. The government next briefly contends that even if the Ak-Chin Settlement Act irrevocably committed the excess Ak-Chin water to the CAP, "[n]either the 1983 allocation decision nor the 1983 contracts compelled the Secretary to allocate a fixed share of the . . . water to petitioners." Opp. at 10. This assertion crumbles in the face of the relevant context and facts.

First, in 1983, the Secretary fully allocated all of the water in the general CAP pool -- *i.e.* "Arizona's remaining entitlement to Colorado River water [under the BCPA]" that had not already been developed through previously-constructed facilities. Pet. at 61a. Against this background alone, the Ak-Chin Settlement Act's identification of "the Central Arizona Project" as the intended recipient of the excess Ak-Chin water logically refers to the comprehensive allocation scheme that the Secretary had devised just one year earlier. This interpretation is confirmed by the legislative history of the Act, which makes clear that the relevant provision was specifically drafted by the Arizona Senators to

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[4]As a predicate for its argument regarding the interpretation of the Ak-Chin Settlement Act, the government also repeats its mantra that the Yuma-Mesa water committed to the Ak-Chin in the Ak-Chin Settlement Act "has always been separate from the CAP," and that thus the "reallocation of the excess Ak-Chin water . . . did not make petitioners worse off" than they were when they entered into their 1983 contracts. Opp. at 8. As the record demonstrates, however, whether or not the Yuma-Mesa water was part of the CAP and subject to the Secretary's 1983 Allocation Decision and implementing contracts was a hotly contested issue, which the relevant provision of the Ak-Chin Settlement Act was specifically designed to settle. See Pet. at 7-9. The government's refusal to acknowledge that irrefutable fact or its significance to the proper interpretation of the Ak-Chin Settlement Act renders its argument unsustainable.

resolve the dispute concerning the non-Indian users' entitlement to the Yuma-Mesa water that Congress proposed to commit to the Ak-Chin. See Pet. at 7-9, 21-23. Finally, as late as 1990, in congressional testimony concerning a proposed settlement of the Fort McDowell Indian Tribe's water claims, the Department of the Interior's witness acknowledged that to use the excess Ak-Chin water in settlement of these claims would require amendment of the Ak-Chin Settlement Act. See Pet. at 9. Amendment, of course, would not have been necessary had the Ak-Chin Act itself not subjected the water to the Districts' and other non-Indian CAP users' contracts.

If this cumulative history were not enough to establish beyond peradventure that the excess Ak-Chin water, allocated to the CAP, was subject to the Districts' contracts, there remains the additional fact that as stated above the Secretary amended his Master Repayment Contract with the CAWCD in 1988 to explicitly provide that the excess Ak-Chin water was "project water" subject to the non-Indian users' pre-existing contracts, including the Districts'. Here again, the government's brief simply omits this fact. This amendment, however, both confirms the correct interpretation of the Ak-Chin Settlement Act itself, and independently precludes the government's reallocation of the excess Ak-Chin water to the San Carlos Apache.

CONCLUSION

The government's opposition sidesteps the significance of this case, focussing instead on an effort to convince this Court to deny the petition because the court of appeals' decision was correct on its merits. As shown above, however, the government's arguments in this regard are demonstrably false. For the reasons set forth in the Districts' petition, a writ of certiorari should issue.

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